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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 214

ERNEST R. FORREST, PETITIONER,

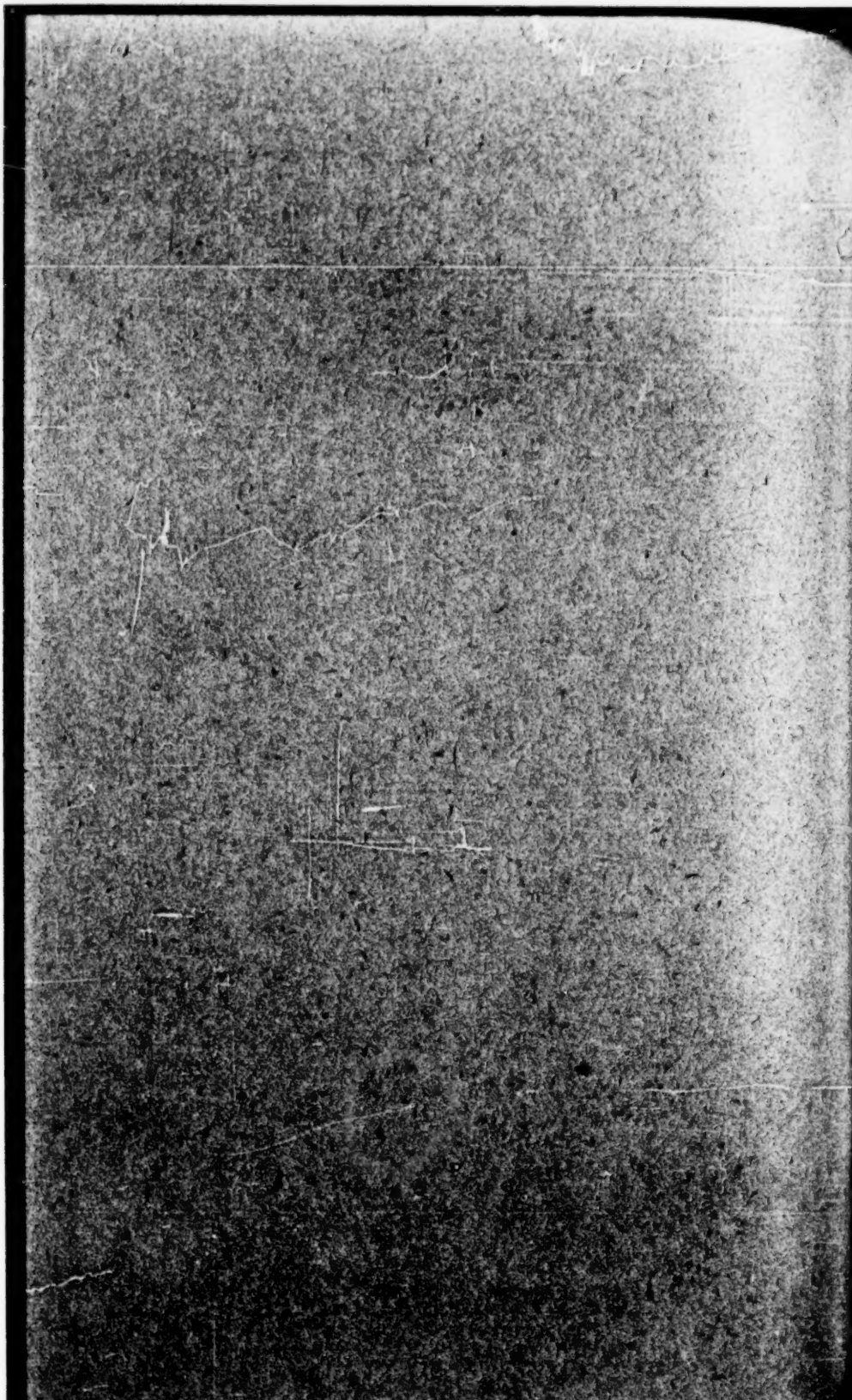
vs.

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 23, 1934.

CERTIORARI GRANTED OCTOBER 8, 1934



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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

Law. No. 12959

ARCH R. JACK, as Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, Plaintiff,

vs.

ERNEST R. FORREST, Defendant

SECOND AMENDED COMPLAINT—Filed April 14, 1933

The plaintiff complains of the defendant and for cause of action alleges:

1

That the Nephi National Bank of Nephi, Utah, is and at all times herein mentioned was a national banking association duly organized and existing under and by virtue of the laws of the United States of America with its principal place of business at Nephi, within the District of Utah.

2

That the said Nephi National Bank of Nephi, Utah, on the 1 day of December, 1931, was insolvent and unable to pay its just and legal debts and pursuant to an order of its board of directors the said banking association on said date closed and suspended business.

3

That on the 26 day of January, 1932, the Comptroller of the Currency of the United States of America, having theretofore determined said Nephi National Bank to be insolvent and unable to pay its just and legal debts, made and [fol. 2] issued his order appointing plaintiff as Receiver of said Nephi National Bank with all the powers, duties and responsibilities given or imposed upon a receiver under the

provisions of the Revised Statutes of the United States which authorize the appointment of a receiver. That a copy of said order of appointment is hereto annexed marked Exhibit A and by reference made a part hereof.

4

That immediately thereupon plaintiff accepted said appointment, gave bond and qualified as such receiver, took possession of all books, records and assets of said Nephi National Bank and ever since has been and now is the duly appointed, qualified and acting receiver of said Nephi National Bank and in possession of its books, records and assets.

5

That immediately upon taking possession of the books, records and assets of said banking association, plaintiff made full and complete examination into such books, records and assets and into the affairs of said banking association and made due accounting thereof to said Comptroller of the Currency. That upon due consideration of the said report and accounting, and upon due evaluation of the uncollected assets of said Nephi National Bank and it appearing therefrom to the satisfaction of said Nephi National Bank and it appearing therefrom to the satisfaction of said Comptroller of the Currency that in order to pay the debts of said Nephi National Bank it was necessary to enforce the individual liability of the shareholders of said banking association to the total amount of such liability, to-wit one hundred dollars, upon each and every share of stock of said association outstanding at date of its failure —all as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1876, and Section 23, Act approved December 23, 1913, known as the Federal Reserve Act—the said Comptroller of the Currency did on the 8 day of March, 1932, make an assessment and requisition upon the shareholders of said Nephi National Bank for $50,000, being one hundred dollars per share of stock outstanding, to be paid on or before the 15 day of April, 1932, and said Comptroller of the Currency did then and there make demand upon each [fol. 3] and every one of the shareholders of said Nephi National Bank for one hundred dollars upon each and every share of such stock held or owned by such share-

holders at the time of the failure of said bank, and said Comptroller of the Currency did then and there, direct plaintiff as receiver to take all necessary proceedings, by suit or otherwise, to enforce to that extent the individual liability of said shareholders. That a copy of said assessment, requisition and order is hereto annexed marked Exhibit B and by reference is made a part hereof.

6

That Henry Forrest died testate the 17 day of August, 1917; that on the 9 day of March, 1918, by an order of the Fifth District Court of Utah in and for Juab County the defendant Ernest R. Forrest was duly appointed administrator with the will annexed of the estate of said deceased; that he thereafter gave bond and took the oath required by law and on the 18 day of March, 1918, received letters of administration with the will annexed and continuously from said date until the 1 day of December, 1931, he continued to be and act as the administrator with the will annexed of said estate.

7

That at the time of his death the said Henry Forrest was the owner of six shares of stock of the Nephi National Bank represented by certificates Nos. 56 and 57 issued in the name of Henry Forrest, and registered in his name in the books of said bank.

8

That said defendant Ernest R. Forrest, upon qualifying as administrator of the estate of said Henry Forrest, deceased, received and took possession of all of the property of said estate including the said six shares of stock of Nephi National Bank. That the property of said estate received and taken possession of by said defendant was of a value of more than $10,000, exclusive of the said bank stock and exclusive of all debts of said decedent and after paying all expenses of administering his estate. That said defendant Ernest R. Forrest as administrator as aforesaid duly rendered to and filed with said Fifth District Court of Utah an inventory as required by law of the property of said estate and therein listed and included the aforesaid bank stock as part of the assets of said estate.

[fol. 4] 9

That by reason of the holding of the aforesaid bank stock and by virtue of the provisions of Sections 64 and 66 of Title 12, United States Code, the said Henry Forrest, at the time of his death, and the said defendant as administrator of the estate of said decedent, were each liable and responsible until a transfer of said stock should be made to and accepted by a solvent transferee for all contracts, debts and engagements of the said Nephi National Bank to the amount of six hundred dollars and all of the property and estate of the said Henry Forrest which came into the hands of the said defendant Ernest R. Forrest as administrator was liable in like manner and to the same extent as the said Henry Forrest was in his lifetime and would be if now living and competent to act and hold the said bank stock in his own name.

10

That upon acceptance of said trust as administrator of the estate of Henry Forrest, deceased, it became and was the duty of the said defendant Ernest R. Forrest to reserve and hold assets of the said estate for the payment of any liability which might accrue or arise in favor of creditors of the said Nephi National Bank or in the alternative to procure the acceptance by and transfer to some solvent transferee of the said six shares of stock of said National Bank.

11

That said defendant, Ernest R. Forrest, in violation of the duty imposed upon him as administrator and by the provisions of Sections 64 and 66 of Title 12, United States Code, wrongfully and unlawfully and with intent, as plaintiff is informed and believes, to prevent said Nephi National Bank and its creditors from enforcing any stockholders liability which might accrue on said stock, distributed, delivered up and disposed of all of the assets and property of the said estate, except said bank stock, without procuring any person to accept the said bank stock and without causing the said stock to be transferred to or accepted by any legatee, devisee or heir of said Henry Forrest or any other person and without requiring any refunding bond or other security or indemnity, and no person has

at any time accepted the said bank stock and the same is now and at all times herein mentioned was registered on [fol. 5] the books of said bank in the name of Henry Forrest as owner; that by reason of the foregoing the said defendant has committed and is guilty of devastavit and breach of trust and is personally liable to the plaintiff herein for the amount of the above mentioned assessment on said bank stock.

12

That by the will of said Henry Forrest, said decedent bequeathed one thousand dollars to Mabel Ruth Owen and devised and bequeathed the remainder of his estate as follows:

"All the rest, residue and remainder of all real and personal property, of any and every kind and nature whatever, owned by me at the time of my death, after satisfying the above named directions and bequest, I give, devise and bequeath to my beloved wife Rhoda Forrest, for her sole use, behoof and benefit, in her support and maintenance for and during her natural life; and should my said wife leave, at the time of her death, any of said property, either real or personal, then I give, devise and bequeath all the rest, residue and remainder of all such property, real and personal of any and every kind and nature, to my beloved son Ernest R. Forrest and my beloved daughter Lucile Hawkins, to be equally divided between them, share and share alike."

13

That, as plaintiff is informed and believes and therefore alleges, the defendant Ernest R. Forrest on or about the 20 day of January, 1920, entered into an arrangement and made an agreement with the said Rhoda Forrest whereby the said defendant agreed to assign and transfer to said Rhoda Forrest his interest as remainder-man in the property of the estate of said Henry Forrest, deceased, and in consideration thereof the said Rhoda Forrest agreed to assign and transfer to the said Ernest R. Forrest certain parts and parcels hereinafter described of the property of the estate of said decedent aggregating in value more than $5,000.00. That pursuant to said agreement and with the intent and purpose and for the sole consideration of obtain-

ing for himself the fee simple title to certain portions of the property of the estate of said Henry Forrest, deceased, hereinafter described, the said Ernest R. Forrest executed and delivered to said Rhoda Forrest an assignment of his [fol. 6] interest in said estate as remainderman and thereafter, to-wit, on the 16 day of April, 1920, the said Rhoda Forrest, pursuant to the aforesaid agreement and without other consideration, conveyed by warranty deed to the said defendant Ernest R. Forrest the real estate hereinafter described, which at the time of his death belonged to the said Henry Forrest, deceased. That the real estate so conveyed was of a value exceeding $5,000.00 and is situate in Juab County, Utah, and described as follows:

Beginning at the Southwest corner of Lot 3, Block 20, Plat "A", of the Nephi Survey of Building Lots; thence North 3 rods; thence East 13 rods; thence South 3 rods; thence West 13 rods to the place of beginning.

Beginning 3 rods North of the Southwest corner of Lot 3, Block 20, Plat "A", of the Nephi Survey of Building Lots, thence running North 3½ rods; thence East 13 rods; thence South 3½ rods; thence West 13 rods to the place of beginning.

The South ½ of Lot 4, Block 18, Plat "A", of Nephi Survey of Building Lots.

14

That by means of the aforesaid arrangement and without other consideration the defendant received and accepted and ever since and now claims and holds the above described items of property of the estate of Henry Forrest, deceased, which property is and at all times herein mentioned was of a value of more than five thousand dollars and plaintiff alleges upon his information and belief that the said Rhoda Forrest received the assignment and transfer of the interest of the defendant in said estate upon the express agreement that she should, upon the closing and distribution of the estate of said Henry Forrest, deceased, transfer and convey to the defendant the legal title to said parcels of real estate, which she did so convey to the defendant immediately upon entry of decree of distribution of said estate.

15

That by reason of the defendant's wrongful acts and conduct above set forth and by reason of defendant's receiving and accepting said property belonging to the estate [fol. 7] of said Henry Forrest without consideration, the said defendant has become and is liable to the plaintiff for the amount of the stockholder's assessment aforesaid and the above described property so received and now held by defendant as aforesaid is and at all times herein mentioned has been subject to a lien in favor of the plaintiff for the payment of the amount of said assessment, to-wit, $600.00 together with interest thereon at eight per cent per annum from 15 April, 1932 until paid.

16

That demand has been made upon said defendant for payment but he has failed, neglected and refused to pay the same or any part thereof.

Wherefore plaintiff prays judgment against the defendant for the sum of six hundred dollars and interest thereon at the rate of eight per cent per annum from 15 April, 1932, and for costs and such other relief as shall be just or equitable.

(Signed) Will L. Hoyt, Plaintiff's Attorney. P. O. Address: Nephi, Utah.

Duly sworn to by Arch R. Jack. Jurat omitted in printing.

State of Utah,
County of Juab, ss:

Priscilla Wilson being first duly sworn on oath deposes and says: That on the 12 day of April, 1933, she mailed a true copy of the foregoing second amended complaint to defendant's attorney, by depositing same in due course of [fol. 8] mails in the U. S. Post Office at Nephi, Utah, enclosed in an envelope with postage fully prepaid thereon legibly addressed to Mr. Claude F. Baker, Attorney at Law, Ureka, Utah.

(Signed) Priscilla Wilson.

Subscribed and sworn to before me this 12 day of April, 1933. (Signed) Will L. Hoyt, Notary Publis. (Seal.) Residence: Nephi, Utah. My commission expires 10 May, 1934.

[File endorsement omitted.]

EXHIBIT A TO SECOND AMENDED COMPLAINT

No. 8508

Treasury Department

Office of the Comptroller of the Currency

Washington, D. C., January 26, 1932.

Whereas, from information on file in this bureau I am satisfied that "The Nephi National Bank," located in the City of Nephi, County of Juab, and State of Utah is insolvent and unable to pay its just and legal debts:

Now, Therefore, I, F. G. Awalt, Acting Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of Section 1 of an Act of Congress entitled "An Act authorizing the appointment of Receivers of National Banks, and for other purposes," approved June 30, 1876, do hereby appoint Arch R. Jack, Receiver of "The Nephi National Bank" with all the powers, duties and responsibilities given to or imposed upon a Receiver under the provisions of the Revised Statutes of the United States which authorize the appointment of a Receiver.

In Witness Whereof, I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia, this Twenty-sixth day of January, A. D. 1932.

F. G. Awalt, Acting Comptroller of the Currency.

(Seal.)

[fol. 9] EXHIBIT B TO SECOND AMENDED COMPLAINT

No. 8508

Assessment Upon Shareholders

Treasury Department

Office of the Comptroller of the Currency

Washington, March 8, 1932.

In the Matter of Nephi National Bank of Nephi, Utah

To all whom it may Concern:

Whereas, upon a proper accounting by the Receiver heretofore appointed to collect the assets of the "Nephi Na-

tional Bank of Nephi," Utah, and upon a valuation of the uncollected assets remaining in his hands, it appears to my satisfaction that in order to pay the debts of such association it is necessary to enforce the individual liability of stockholders therefore to the extent hereinafter mentioned, as prescribed by Sections 5151 and 5234 of the Revised Statutes of the United States, Section 1c 156, Act of June 30, 1867, and Section 23 Act approved December 23, 1913, known as the Federal Reserve Act.

Now, Therefore, by virtue of the authority vested in me by law, I do hereby make an assessment and requisition upon the shareholders of the said "Nephi National Bank of Nephi," Utah, for Fifty Thousand ($50,000.00) Dollars, to be paid by them on or before the fifteenth day of April, 1932, and I hereby make demand upon each and everyone of them for the par value of each and every share of the capital stock of said association held or owned by them, respectively, at the time of its failure; and I hereby direct Arch R. Jack, the Receiver heretofore appointed, to take all necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In Witness Whereof, I have hereunto set my hand and caused my seal of office to be affixed to these presents, at the City of Washington, in the District of Columbia this eighth day of March, A. D. 1832.

J. W. Pole, Comptroller of the Currency. (Seal.)

[fol. 10] IN UNITED STATES DISTRICT COURT

DEMURRER TO SECOND AMENDED COMPLAINT—Filed April 22, 1933

Comes now the defendant and demurring to the second amended complaint of plaintiff, for grounds of demurrer states:

1. That said second amended complaint does not state facts sufficient to constitute a cause of action.

2. That several causes of action have been improperly united in the second amended complaint, in this to-wit: that the second amended complaint attempts to state a cause

of action against defendant in his capacity as administrator of the estate of Henry Forrest, Deceased, and improperly united therewith a cause of action against defendant as the grantee of the estate's distributee.

3. That there is a defect of parties defendant in this to-wit: that the administrator of the estate of Henry Forrest, Deceased, has not been made a party defendant herein.

Wherefore, defendant prays that his demurrer be sustained.

(Signed) Claude F. Baker, Attorney for Defendant.

(Affidavit of service attached.)

IN UNITED STATES DISTRICT COURT

ANSWER—Filed April 29, 1933

Without waiving any rights under demurrer in said cause, the defendant in answering the second amended complaint, admits, denies and alleges:

1. Admits paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of said second amended complaint.

2. Denies each and every allegations of paragraphs 9, 10 and 11 of said second amended complaint. In answering said paragraph 11, defendant alleges that the only reason that said stock was registered in the name of said deceased after March 11, 1920, was the neglect and failure of the bank to discharge its duty in registering the said stock in the name of Rhoda Forrest, deceased; that from and after March 11, 1920, defendant had no control or possession of said stock; that from and after March 11, [fol. 11] 1920, said stock was in the possession and control of said bank and said Rhoda Forrest; that said bank had control and possession of said stock and knowledge of the ownership of said Rhoda Forrest for a considerable time prior to the date when it suspended business: that said stock is now, and ever since March 11, 1920, has been the sole property of said Rhoda Forrest with full knowledge of said bank and plaintiff, and has not been the property of the estate of Henry Forrest, deceased.

3. Answering paragraph 12 of said second amended complaint, defendant admits same.

4. Answering paragraph 13 of said second amended complaint, defendant admits that on or about January 20, 1920, he conveyed to Rhoda Forrest his remainder interest in said estate; that on April 16, 1920, he received from Rhoda Forrest a conveyance of the real estate described in said paragraph; that said realty was of a value of not to exceed $2,000.00. Further answering said paragraph defendant denies each and every allegation thereof not hereinabove admitted, qualified or denied.

14. Answering paragraph 14 of said second amended complaint, defendant admits that ever since April 16, 1920, he has been the owner of said realty described in paragraph 13. Further answering said paragraph 14, defendant denies each and every allegation thereof not herein admitted, qualified or denied.

15. Answering paragraph 15 of said second amended complaint, defendant denies each and every allegation thereof.

16. Answering paragraph 16 of said second amended complaint, defendant admits that demand for payment was made; that defendant has refused to pay same.

17. Further answering said second amended complaint, defendant denies each and every allegation therein continued.

As a further answer, defendant alleges:

1. That on March 11, 1920, the Fifth Judicial District Court of Juab County, Utah, duly entered in the matter of the estate of Henry Forrest, deceased, then and there pending in said court, its decree of distribution of all the property and assets of said estate, and including the six shares of bank stock described in the pleadings in this cause. That defendant was then and there the duly ap- [fol. 12] pointed, qualified and acting administrator with will annexed of said estate. That on April 7, 1920, said decree was duly filed and entered in said court. That said decree distributed all the property of said estate to Rhoda Forrest, the wife of said deceased, and the mother of defendant; that all of said property pursuant to said decree,

and as ordered and required by said decree was forthwith delivered to said Rhoda Forrest including said 6 shares of bank stock; that from said time on, that is from and after March 11, 1920, said Rhoda Forrest and said bank had the sole custody, control and possession of said stock; that said bank at all times thereafter knew that Rhoda Forrest was the sole owner of said stock; that all rights, benefits and dividends accruing to said stock thereafter were received by said Rhoda Forrest and not by the estate of Henry Forrest, deceased, or by defendant.

2. That on November 18, 1931, the said bank issued its receipt, which is on file in the office of the clerk of the District Court of Juab County, Utah, in the files of the estate of Henry Forrest, deceased, and which has been on file there ever since November 18, 1931, as follows, to-wit:

"Nephi City, Utah, November 18, 1931. This is to certify that Nephi National Bank, a corporation organized and existing under, and by virtue of the laws of the United States of America, has on this 18th day of November, A. D. 1931, received of Ernest R. Forrest, Administrator of the estate of Henry Forrest, deceased, the following described certificates of the capital stock of said bank, to-wit:

"Certificate No. 56, date May 28, 1907, signed by E. R. Booth, Cashier and J. S. Ostler, President, issued to Henry Forrest for one share.

"Certificate No. 57, dated May 28, A. D. 1907, signed by E. R. Booth, Cashier, and J. S. Ostler, President, to Henry Forrest for five shares.

"The said certificates and each of them to be held in trust for the estate of Rhoda Forrest, deceased.

"Nephi National Bank, by Ralph Brough, Chr."

Filed #427 probate, Nov. 18, 1931. J. H. Vickers, Clerk."

[fol. 13] That upon the death of his mother, said Henry Forrest as son and an heir of his said mother, Rhoda Forrest, deceased, discovered said stock among the effects of her estate, and delivered said stock to said Nephi National Bank as set forth in said receipt; that said bank

thereupon issued said receipt as above set forth which defendant filed in the files of the estate of Henry Forrest, deceased, as above set forth on November 18, 1931.

3. That by reason of the facts as above appearing, plaintiff and said bank are estopped to assert that the estate of Henry Forrest, deceased, is the owner of said stock, or that defendant is in any manner liable to plaintiff in respect to said stock.

Wherefore, defendant prays that plaintiff take nothing; that defendant have his costs herein.

(Signed) Claude F. Baker, Attorney for Defendant.

Duly sworn to by E. R. Forrest. Jurat omitted in printing.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

REPLY—Filed April 29, 1933

The plaintiff for reply to the answer of defendant herein admits, denies, and alleges as follows:

1. The plaintiff alleges that said answer does not state facts sufficient to constitute any defense to the cause of action set forth in plaintiff's complaint.

2. Plaintiff admits that, on or about November 18, 1931 [fol. 14] (being twelve days prior to the failure of the Nephi National Bank), the defendant delivered to said Nephi National Bank certificates Nos. 56 and 57 evidencing the six shares of stock of said Nephi National Bank involved in this action, and that defendant took from said Nephi National Bank the receipt referred to in paragraph 2 of the defendant's affirmative answer. Plaintiff admits that said certificates of bank stock thereafter remained in possession of said Nephi National Bank until its failure and are now in possession of plaintiff.

3. Replying to the allegations of paragraph one of defendant's affirmative answer, plaintiff admits the entry, at the time alleged, of the decree of distribution in the matter of the estate of Henry Forrest, deceased and ad-

mits that said decree directed distribution of all the property of the estate of Henry Forrest, deceased, including the bank stock herein involved, to Rhoda Forrest, the wife of said deceased. Plaintiff upon information and belief denies the remaining allegations of said paragraph one and alleges that defendant did not at any time deliver to said Rhoda Forrest the said bank stock or possession of the real estate described in paragraph thirteen of plaintiff's complaint herein; but on the contrary kept and retained possession of said real estate and at all times claimed and held possession of the said real estate as his own pursuant to the arrangement and agreement between the defendant and the said Rhoda Forrest referred to in paragraph thirteen of plaintiff's complaint. Plaintiff further alleges that the said Rhoda Forrest immediately after entry of said decree of distribution, pursuant to the aforesaid arrangement and agreement, conveyed to the defendant the legal title to the said real estate without any other consideration. Plaintiff denies that the said Nephi National Bank had knowledge or notice at any time prior to November 18, 1931, of the said decree of distribution, or of the said Rhoda Forrest being entitled to receive the said bank stock.

4. Answering paragraph two of defendant's affirmative defense, plaintiff admits the issuance of the receipt therein mentioned at the time alleged, and that said receipt has been on file in the office of the clerk of the district court as alleged. Plaintiff has not sufficient knowledge or information upon which to base a belief as to the truth of the [fol. 15] remaining allegations of said paragraph, and therefore and upon that ground, denies the claim.

5. Except as herein before admitted, plaintiff denies each and every affirmative allegation of defendant's answer.

(Signed) Will L. Hoyt, Plaintiff's Attorney.

Duly sworn to by Arch R. Jack. Jurat omitted in printing.

[File endorsement omitted.]

Copy received April 29, 1933. Claude F. Baker, Atty. for Defendant.

IN UNITED STATES DISTRICT COURT

MINUTE ENTRY—April 29, 1933

[Before Judge Johnson]

At this 29th day of April, 1933, comes plaintiff by Will L. Hoyt, his attorney, and defendant by Claude Baker, his attorney, and the demurrer to the second amended complaint was by the court overruled and answer and reply were thereupon filed in open court and the case called for trial. Upon stipulation in open court it was ordered that jury be waived and on the part of defendant W. A. C. Bryan and E. R. Forrest were sworn and examined and both sides rest. And the court having heard the arguments of counsel finds in favor of defendant.

Wherefore, it is ordered and adjudged by the court that plaintiff, Arch R. Jack, Receiver of the Nephi National Bank of Nephi, Utah, a corporation, take nothing by its [fol. 16] complaint herein and that defendant, Ernest R. Forrest recover of and from plaintiff his costs herein expended to be taxed upon a verified cost bill and have execution therefor. And let judgment accordingly be entered in the judgment book of this court.

IN UNITED STATES DISTRICT COURT

JUDGMENT

At this 29th day of April, 1933, the same being a juridical day of the April term, 1933, Central Division of said court, Present, Honorable Tillman D. Johnson, Judge, plaintiff appearing by Will L. Hoyt, his attorney, and defendant by Claude Baker, his attorney, and the demurrer to the second amended complaint heretofore filed was by the court overruled and thereupon answer and reply were filed in open court and this cause came on for trial, whereupon, stipulation was made in open court that jury be waived, and on the part of plaintiff W. A. C. Bryan and E. R. Forrest were sworn and examined as witnesses and both sides rest. Whereupon the court having heard the arguments of counsel and being well advised finds in favor of defendant and against plaintiff.

Wherefore, it is ordered and adjudged by the court that plaintiff, Arch R. Jack, Receiver of the Nephi National Bank of Nephi, Utah, a corporation, take nothing by its complaint herein and that defendant, Ernest R. Forrest recover of and from plaintiff his costs herein expended to be taxed upon a verified cost bill and have execution therefor.

Attest:

W. B. Wilson, Clerk.

In United States District Court

Order Extending Time—Filed June 5, 1933

Good cause appearing therefor, it is hereby ordered that plaintiff may have until and including June 20, 1933, within which to prepare, serve and lodge his bill of exceptions in the above entitled case.

Dated this 27th day of May, 1933.

Tillman D. Johnson, Judge.

[fol. 17] In United States District Court

Bill of Exceptions—Lodged Mar. 27, 1933; Filed June 26, 1933

Be it remembered that the above entitled case came on for hearing of defendant's demurrer to the second amended complaint of plaintiff before the Honorable Tillman D. Johnson, judge of the above entitled court on Saturday, April 29, 1933, Will L. Hoyt, Esq., representing the plaintiff and Claude F. Baker, Esq., representing the defendant. The demurrer of the defendant was overruled and denied. Whereupon, the case was, by agreement of the parties, called for trial upon the second amended complaint of the plaintiff, the answer of the defendant and the reply of the plaintiff thereto. The plaintiff and defendant stipulated in open court that a jury be waived and that the case proceed to trial before the court and it was so ordered. Thereupon the following proceedings were had:

WILLIAM A. C. BRYAN called and sworn as a witness for the defendant testified as follows:

I reside at Nephi, Utah, am a practicing attorney, and have been for a great many years. On November 18, 1931, I acted as attorney for E. R. Forrest, defendant herein. I am familiar with the original receipt filed in the District Court of Juab County, Utah, in the matter of the estate of Henry Forrest, deceased, a copy of which receipt is contained in defendant's Exhibit 1 herein headed "Nephi, State of Utah, November 18, 1931." I delivered the certificates of stock of Nephi National Bank mentioned in this receipt to the cashier of said bank on November 18, 1931. I stated to him at that time that Rhoda Forrest, or that the estate of Henry Forrest, deceased, had been closed some time before, the final report had been made, the final account of the administrator and the distribution had been made distributing the property of the estate of Henry Forrest, deceased to Rhoda Forrest, and that I found by the decree of distribution that the certificates of stock described in this receipt had been found by Mr. E. R. Forrest, who was the administrator of the estate of Henry Forrest, deceased, that he had discovered these certificates after the death of Rhoda Forrest, deceased, and he wanted to know what to do with them. I told him he had better deliver them to the Nephi National Bank to be held by the bank in trust for the estate of Rhoda Forrest, deceased, [fol. 18] that no administration had been had on that estate, and that these certificates of stock belonged to the estate of Rhoda Forrest, deceased. I left the two stock certificates mentioned in that receipt with the Nephi National Bank at that time, and so far as I know, they are still in possession of the bank.

E. R. FORREST, the defendant herein, testified in his own behalf as follows:

I reside at Nephi, Utah, am sixty-one years of age, and am a hotel proprietor. I was the administrator of the estate of my deceased father, Henry Forrest. I carried out the decree of distribution in my father's estate (copy of which is contained in defendant's Exhibit 1 herein). I carried out the provisions of said decree of distribution

according to its terms by delivering the property mentioned in that decree to my mother, Rhoda Forrest. I delivered to my mother the two certificates of stock of Nephi National Bank mentioned in said decree. I next saw those certificates of stock after the death of my mother. She died the 4th of July, 1931. I found the certificates at my mother's home in a little box she kept things in. As her son and heir, I went through her effects and discovered these certificates in a box at her home. I showed them to Mr. Bryan and he advised me to deliver them to the bank. I did not have them in my possession after distribution was made until I found them among my mother's effects.

Defendant's Exhibit 2, a dividend check of the Nephi National Bank dated June 30, 1920, was mailed to Henry Forrest and the mail came to me. I took it over and deposited it in the Nephi National Bank to my mother's account. I told them that the stock belonged to mother, and that they had better make out the checks to her hereafter.

(Thereupon defendant's Exhibit 2 was offered and admitted in evidence. Defendant's Exhibit 1, being a certified copy of certain probate court files in the estate of Henry Forrest, deceased, was then offered and admitted in evidence Defendant's Exhibits 1 and 2 are attached at the end of this bill of exceptions and are hereby referred to.)

I think I am familiar with the pleadings in this cause. I think I have read them over. Referring to the allegation [fol. 19] in the second amended complaint, that in consideration of surrendering my interests as a remainderman of the estate of my father, to my mother, I received certain property under an agreement—there was no agreement at all. My mother wished to get rid of her property. She was blind and could not attend to anything herself. She wanted to sell it or dispose of it. Nobody knew how she wanted to dispose of it. She did not say. I consulted Mr. Burton who was the attorney of the estate at the time it was settled, and he advised her to do that way with it.

Q. That is, for you to convey your interest to her?
A. Yes, sir.
Q. And he advised your sister the same way?
A. He advised her the same way.

We had no understanding or agreement that mother was to convey any property back to us afterward. A short time

afterward I received a deed to certain property as described in the second amended complaint from my mother.

Q. Did you pay anything for that?
A. No.
Q. Under what circumstances did you receive that property?
A. She just wished to give it to us, dispose of it that way I guess.

I did not have any conversations or make any representations to her that induced her to make the conveyance. She just did it of her own accord. It was voluntary on her part as far as I know. So far as I am informed, there was no connection between my deeding my interest away as remainderman and thereafter receiving this property from my mother.

On cross-examination Ernest R. Forrest testified as follows:

The conveyance to me by my mother was just about a month after the decree of distribution of my father's estate. The decree of distribution was within a month or so after my assignment to my mother of my interest in the estate.

Q. Your mother conveyed to you and your sister the bulk of the estate, did she not, within a month or six weeks following the decree of distribution?
[fol. 20] A. I think the records show that, yes.
Q. I am referring now to the value of the property, the property conveyed to you and your sister constituted at least two-thirds of the property of the estate, did it not, in value?
A. It probably did.
Q. It exceeded $10,000.00, didn't it, the property conveyed?
A. It was listed about that, I think.

The value of the part that I received from my mother was worth over $2,000.00.

Q. You gave nothing for it; you received it as a gift, you say, from your mother?
A. No cash consideration, no.

Q. Nor any other consideration except your assignment to your mother?

A. That I was to take care of her the rest of her life.

Q. Wasn't that the consideration for a later deed in 1928?

A. It was for both of them; it was understood that we would take care of her, both of us, my sister and I, and later when the deed to the house was turned over to me, I agreed to take it on myself to take care of her.

Q. You agreed in 1928 to take care of your mother?

A. Yes, sir, that is when the transfer was made.

Q. When she conveyed to you that last piece of real estate?

A. Yes.

Q. But in 1920 this was just a matter of convenient settlement of your father's estate, wasn't it?

A. How do you mean?

Q. The reason that you conveyed or assigned to your mother and then had a decree of distribution to her, and a deed back to you and your sister, wasn't that merely Mr. Burton's convenient way of settling the estate?

A. Well, it was according to the recommendation of the attorney. I don't know—it was mother's wishes, that was all. There was no understanding that mother would deed back to me at all.

Q. The conveyance to your sister was on the 20th of March, 1920, just nine days after the court decree, wasn't it?

A. I don't remember the date.

[fol. 21] Mr. Baker: We have admitted the records on that if you have a record there.

Mr. Hoyt: I have certified copies of the deeds from Rhoda Forrest as they appear on the county records. Will you stipulate that they may be introduced?

Mr. Baker: Subject to our objection that they are incompetent, irrelevant, immaterial; we admit they are certified copies.

(Thereupon plaintiff offered in evidence plaintiff's Exhibit A, being certified copies of four deeds. The exhibit was received and defendant noted exception. Thereupon plaintiff's Exhibit B, an original deed was received in evidence without objection. Plaintiff's Exhibits A and B are

attached at the end of this Bill of Exceptions and made a part hereof.)

I don't know why the language "This property comes to granteee as an heir at law of Henry Forrest, deceased" was put on my deed. I don't know whether it was put on before it was recorded or not. The typewriting of those words looks different from the balance of the deed. It is blacker, that is the only difference I can see. It is a little smaller, too. I think the deed was recorded at my request. I don't know why he put in that language "This property comes to grantee as an heir at law of Henry Forrest, deceased." I did not remember it was in there at all.

I don't remember anything about the notation in the deed to Emma L. Hawkins "This property comes to grantee as an heir at law of Henry Forrest, deceased." Those deeds were put in by Mr. Burton. He had them recorded and sent to me as I remember it. I did not really know what was in them. I left the handling of it pretty largely to Mr. Burton. I was interested in the estate as remainderman. My mother was given a life interest with the remainder to us if there was anything left. I signed the inventory in the matter of my father's estate. The property as shown by that inventory was valued at a total of $17,481.85. Part of the notes were never collected. They were not worth the inventory value and were stricken off later. All of the real estate except two small parcels were transferred to me and my sister within about six weeks after the decree of distribution was entered. The trans-[fol. 22] fer was made without any consideration, only one dollar. He said to pay mother one dollar, and I paid it. I signed the petition for final discharge of administrator in my father's estate in which it is recited:

"That on the 11th day of March, 1920, by a decree of this court duly made and entered herein, all of the residue of said estate was distributed to said Rhoda Forrest, and with the exception of six shares of the capital stock of the Nephi National Bank, said Rhoda Forrest took possession of, and disposed of all of the said property so distributed to her, during her lifetime."

Mother took possession of the stock, too.

Q. Why did you say with the exception of it?

A. I don't know. I did not know that was in there.
Q. You read this before signing it, did you not?
A. I don't know whether I did or not.

In 1928 mother gave me a deed to the last piece of property that stood in her name. That property did not come from the estate.

Q. You knew at all times that that bank stock had not been transferred to your mother on the books of the bank, did you not, Mr. Forrest?
A. I was aware that it had not been transferred. She did not want it.
Q. She did not want the stock?
A. No.
Q. You had reason to believe that the bank was in failing circumstances, and you did not want it, and she did not want it?
A. I did not. At that time there was nothing said.

At that time I don't know as it was thought anything about the bank failing. But they had not paid any dividends, and she did not want it, so she said.

The dividend check issued subsequent to the decree of distribution, that is on June 30, 1920, came to me by mail. It was made out to "Henry Forrest, estate."

Q. So that you knew at that time that the stock had not been transferred on the books of the bank?
[fol. 23] A. Yes.
Q. And you did not transfer it, because your mother did not want it?
A. She had it but she did not want it transferred.
Q. You did not take any refunding bond or any indemnity from your mother to protect you from any liability that might attach to the bank stock?
A. No, I never thought of anything of that kind.

My mother died in July 1931. On the 18th of November 1931, I had Mr. Bryan take the certificates to the bank and leave them with the cashier. I had no reason to believe the bank was in failing circumstances. I did not know. I had withdrawn my deposit from that bank a long time before. A year or two before. It was not for that reason, though. It was for other reasons.

Q. Why did you go to the bother in 1931 of petitioning the court for your discharge as administrator after allowing the matter to drag on from 1920?

A. Because mother had died and I was advised to do it.

Mother died in July—about five or six months before the petition. There was no connection between my wanting to be discharged as administrator, and rumors of the impending insolvency of the Nephi National Bank. It was not because I was afraid the bank was going to fail that I was anxious to be discharged. I did not see any reason why I should still be administrator after she was dead. There was nothing to administer.

Q. Was there any reason for your being administrator of your father's estate after it was distributed?

A. I don't know that there was, only to take care of mother.

Q. So you allowed yourself to continue as administrator in order to take care of your mother as long as she lived?

A. Partly.

Q. And then after her death you got yourself discharged?

A. Yes.

I knew at the time I received my deed from my mother in 1920 that I had not transferred the bank stock to her. [fol. 24] I knew she did not want the stock. I accepted property worth more than $2,000.00 from my mother. It was deeded to me.

I don't remember receiving more than one dividend check from the Nephi National Bank. I did not make any effort at any time to get the stock transferred into my mother's name on the books of the bank. I tried to sell it for her one time, eight or ten years ago. Mother and I together looked after her business for her subsequent to my father's death. I had the most of it to do. My mother left no estate at the time of her death, outside of the bank stock.

Plaintiff rests.

Defendant rests.

MOTION BY PLAINTIFF FOR JUDGMENT

Mr Hoyt: The plaintiff now moves the court for a declaration of law and judgment in plaintiff's favor, and further moves the court, in case the court rules against the plain-

tiff's contention as to the liability of the defendant in a law action, that the cause be transferred to the equity side of the court, and that a decree be entered in favor of the plaintiff impressing the property described in plaintiff's second amended complaint with a lien for the payment of the stockholder's liability referred to in said complaint.

MOTION BY DEFENDANT FOR JUDGMENT

Mr. Baker: Comes now the defendant and moves the court for a judgment and declaration of law in defendant's favor to the effect that the second amended complaint of the plaintiff does not state facts sufficient to constitute any cause of action as against the defendant, and that the evidence in the case is insufficient to sustain any action at law or any relief whatsoever on behalf of the plaintiff as against the defendant, and that defendant recover costs.

The Court: The motion of the plaintiff for a declaration of law and judgment in plaintiff's favor is denied and plaintiff's motion for leave to transfer the cause to the equity side of the court for the purpose of impressing property described in the complaint with a lien will be denied. The motion of the defendant on the evidence will be granted, and the case dismissed, the defendant to recover his costs. [fol. 25] Mr. Hoyt: The plaintiff excepts to the ruling of the court granting the defendant's motion, and also to the ruling of the court denying the plaintiff's motion for a declaration of law and judgment in plaintiff's favor, and denying plaintiff's motion to have the cause transferred to the equity side of the court and for a decree impressing the property described in the second amended complaint with a lien in plaintiff's favor for the payment of the stockholder's liability referred to in said amended complaint.

DEFENDANT'S EXHIBIT 1

In the District Court of the Fifth Judicial District in and for Juab County, State of Utah

In the Matter of the Estate of HENRY FORREST, Deceased

Decree of Distribution

Ernest R. Forrest, administrator with the will annexed of the estate of Henry Forrest, deceased, having on this 18

day of February, 1920, rendered and filed herein a full account and report of his administration of said estate, which account was for final settlement, and having with said account filed a petition for the distribution of said estate; and the said petition set forth, among other things, that all accounts have been filed and settled and that said estate is in a condition to be closed and that a portion of said estate remains to be distributed to the heirs of said decedent who may be entitled thereto and praying that said residue be distributed to the parties entitled thereto, and said matter coming on regularly to be heard this 11th day of March, 1928, this court proceeds to the hearing of said petition; and it appearing to the satisfaction of this court that the clerk had fixed the time and place of the hearing of said petition and giving due notice thereof as required by law; that all of the heirs at law of said deceased had given their assent in writing waiving notice and time of the hearing of the petition for decree of distributon and of the hearing of the final account and consent that said final account may be allowed and approved as filed; that said final accounts have been fully settled; that all taxes upon the property of the estate, including all inheritance tax which has become due and payable, have been fully paid and that [fol. 26] all legacies have been fully satisfied and that the residue of said estate consisting of the property hereinafter particularly described, is now ready for distribution and said estate is now in a condition to be closed.

And it further appearing that Ernest R. Forrest and Emma Lucile Hawkins, heirs at law of said deceased, have made, executed and delivered unto the said Rhoda Forrest, the only other heir of said deceased, for a valuable consideration, a good and sufficient conveyance for all of their right, title and interest of, in and to all of the real and personal estate of said deceased, and that the said Rhoda Forrest then and there became the owner in fee of the interest of the said Ernest R. Forrest, and Emma Lucile Hawkins as heirs at law, or otherwise, of, in and to all of the property of said estate

And it further appearing that the said Rhoda Forrest, widow of the said deceased, is now the owner in fee of all of the residue of said estate and as the grantee of said heirs of said Henry Forrest, deceased, is entitled to have all of the residue of said estate distributed to her by a decree of this court.

And it further appearing that said Henry Forrest left surviving him those certain persons whose names and relationship to the said deceased are as follows.

Rhoda Forrest, widow of said deceased, age 69 years, Ernest R. Forrest, a son of said deceased, age 45 years, and Emma Lucile Hawkins a daughter of said deceased, age 28 years, all residing at Nephi City, Juab County, Utah.

Now, Therefore, on motion of Thomas H. Burton, Esq., counsel for the administrator of said estate, no objection being made thereto, it is hereby Ordered, Adjudged and Decreed that the residue of the estate of Henry Forrest, deceased, hereinafter particularly described and now remaining in the hands of the said administrator, and any other property which may belong to said estate or which said estate may have any interest in, be and the same is hereby distributed to Rhoda Forrest, widow of said deceased, absolutely and forever.

The following is a particular description of the said resi- [fol. 27] due of said estate referred to in this decree of which distribution is ordered, adjudged and decreed as aforesaid, to-wit:

Personal Property

Promissory note of George McCune, secured by mortgage given in the amount of $1750.00, dated October 11th, 1909	$1750.00
Promissory note of Ed. Knowlden, dated Feb. 20, 1909, given for $115.00 at 10% interest, account due on same	75.00
Promissory note of A. V. Hague, dated July 2nd, 1912, given for $80.00 at 8% interest	80.00
Promissory note of Orson Worthington, dated February 17th, 1914, given for $52.65, at 8% interest	52.65
Promissory note of Jake Bowers, dated Sept. 18, 1909, given for $25.00, interest at 12%, present value	10.00
Promissory note of C. R. Foote, dated Dec. 20, 1910, given for $50 interest at 10%	20.00
Promissory note of H. Carter, dated Feb. 7, 1915, given for $50.00 interest at 8%	50.00
Six shares of Capital Stock of Nephi National Bank	600.00
1¼ Shares Capital Stock of Nephi Irrigation Company	125.00

Real Property

Beginning at the Northwest Corner of Lot 4, Block 20, Plat "A" of the Nephi Survey of Building Lots, thence running East 38 feet; thence South 4 rods and 21 links; thence West 38 feet; thence North 4 rods and 21 links to the place of beginning.

Also, beginning 80 feet South of Northwest corner of said Lot 4, thence running East 38 feet; thence South 18 feet; thence Southwesterly to a point 31 feet South of place of beginning; thence North 31 feet to the place of beginning,

Beginning at the Southwest corner of Lot 3, block 20, Plat "A" of the Nephi Survey of Building Lots, thence North 3 rods; thence East 13 rods; thence South 3 rods; thence West 13 rods to beginning,

Beginning 3 rods North of the Southwest corner of Lot 3, Block 20, Plat "A" of the Nephi Survey of Building [fol. 28] Lots, thence running North 3½ rods; thence East 13 rods; thence South 3½ rods; thence West 13 rods to the place of beginning,

Beginning 7 rods North of the Southeast corner of Lot 1, Block 44, Plat "A" of the Nephi Survey of Building Lots; thence West 68 feet 9 inches; thence North 3½ rods; thence East 68 feet, 9 inches; thence South 3½ rods to the place of beginning.

An undivided one-half interest in and to the following:

Beginning at a point 60 feet 9 inches South of the Northwest corner of Lot 3, Block 36, Plat "A" of the Nephi Survey of Building Lots; thence running East 110 feet; thence South 6 feet 6 inches; thence East 52 feet; thence South 40 feet; thence West 162 feet; thence North 46 feet 6 inches to the place of beginning,

Beginning 68 and ¾ feet West of the Southeast corner of Lot 1, Block 44, Plat "A" of the Nephi Survey of Building Lots; thence West 46 and ¾ feet; thence North 16 rods; thence East 46¾ feet; thence South 16 rods to the place of beginning,

All of Lot 4, Block 18, Plat "A" of the Nephi Survey of Building Lots.

Done in open court this 11th day of March, A. D. 1920.

(Signed) D. H. Morris, Judge.

Filed April 7, 1920.

IN THE DISTRICT COURT, PROBATE DIVISION, IN AND FOR COUNTY OF JUAB, STATE OF UTAH

In the Matter of the Estate of HENRY FORREST, Deceased

Decree Showing That Due and Legal Notice to Creditors Has Been Given

It appearing to the satisfaction of this court that due and legal notice to creditors of said estate has been given:

It Is Hereby Ordered, Adjudged and Decreed, that due and legal notice to the creditors of said Henry Forrest, [fol. 29] deceased, has been given; that the same is established of record and that this decree be entered upon the minutes of this court.

By the Court.

D. H. Morris, District Judge.

Dated this 12 day of March, A. D. 1920.
Filed April 9, 1920.

IN THE FIFTH JUDICIAL DISTRICT COURT OF THE STATE OF UTAH, IN AND FOR THE COUNTY OF JUAB

In the Matter of the Estate of HENRY FORREST, Deceased

Order Approving Account

It appearing to the court that E. R. Forrest, as administrator of the above entitled estate, has presented his final account for settlement and allowance and has filed his petition for discharge, and the said matter coming on regularly to be heard this — day of ——, 1920, and proof having been submitted showing to the satisfaction of the court that said account is true and correct and should be allowed; and that proper vouchers covering disbursements are filed; and it further appearing that there are funds and property in the hands of the Administrator for distribution; and that all of the acts of the said E. R. Forrest, as such administrator have been in conformity with law and the orders of this court herein made, and that said estate has been closed.

And it further appearing that all of the heirs of said estate have filed in this court their written waiver and con-

sent waivering all time and notice of the hearing of the final account of the Administrator of said estate, and have consented that said final account may be settled, allowed and approved as rendered.

Now, Therefore, it is Ordered and Decreed that the final account of the said administrator be and the same is hereby approved, allowed and settled in all respects as the same is rendered and presented for settlement.

Dated this 11th day of March, 1920.

(Signed) D. H. Morris, Judge.

Filed April 10, 1920.

[fol. 30] In the District Court of the Fifth Judicial District in and for the County of Juab, State of Utah

In the Matter of the Estate of Henry Forrest, Deceased

Petition for Final Discharge of Administrator

The undersigned. Ernest R. Forrest, administrator, with the will annexed, of the estate of Henry Forrest, deceased, and heir at law of said decedent, and Emma Lucile Hawkins, daughter and heir at law of said decedent, and Mabel Ruth Lunt—nee Mabel Ruth Owen, legatee named in the last will and testament to participate in the estate of said decedent, respectfully represent to and petition this Honorable Court, as follows:

1

That said Henry Forrest died testate at Nephi City, Juab County, State of Utah, on the 17th day of August, A. D. 1917, being at the time of his death a resident of said City, County and State and leaving therein both real and personal property.

2

That said testator left a will which was duly admitted to probate by an order of this court dated March 9th, 1918, as the Last Will and Testament, of said decedent.

3

That by an order of this court duly made and entered herein, Ernest R. Forrest was appointed administrator of

said estate with the will annexed on the 9th day of March, A. D. 1918, and he duly qualified as such administrator by filing the bond and taking and subscribing the oath prescribed by law, and Letters of Administration was issued to him and he entered upon the duties of said trust and he has ever since been and now is the duly appointed, qualified and acting administrator of said estate.

4

That under the provisions of said will, Rhoda Forrest, surviving wife of said decedent, and Ernest R. Forrest, son of said decedent, and Emma Lucile Hawkins, named in said will as Lucille Hawkins, and Mabel Ruth Lunt, named in said will as Mabel Ruth Owen; the said Emma Lucile Hawkins being a daughter of said decedent and the said Mabel Ruth Lunt being a niece of said decedent, are all of and the [fol. 31] only persons named in said will as beneficiaries thereunder; and the only heirs at law of said decedent, and the only persons interested in the estate of said decedent.

That said surviving wife, Rhoda Forrest, died intestate at Nephi City, Juab County, State of Utah, on the 4 day of July, A. D. 1931.

That said Ernest R. Forrest, son of said Henry Forrest, deceased, is 60 years of age and resides at Nephi City, Utah.

That said Emma Lucile Hawkins, daughter of said Henry Forrest, deceased, is 40 years of age and resides at Nephi City, Utah.

That said Mabel Ruth Lunt is 32 years of age and resides at Nephi, Utah.

5

That on the 18th of February, 1920, said administrator filed his final account of his administration and said estate in this court, and on the 11th day of March, 1920, this court made an order and decree allowing, approving and settling said account, and with said Final Account said administrator also filed herein his petition praying for a decree distributing the residue of said estate in the hands of said administrator to Rhoda Forrest, widow of said decedent, who had, by conveyances duly executed, acknowledged and delivered to her by all other parties interest in said estate, become the owner of all of the residue of said estate and entitled to a decree distributing the same to her.

6

That on the 11th day of March, 1920, by a decree of this court, duly made and entered herein, all of the residue of said estate was distributed to said Rhoda Forrest, and with the exception of Six shares of the Capital Stock of Nephi National Bank, said Rhoda Forrest took possession of, and disposed of all of the said property so distributed to her, during her lifetime.

That these petitioners are informed and believed that said sixe shares of the capital stock of Nephi National Bank is all of the property owned by said Rhoda Forrest at the time of her death on the 4 day of July, 1931.

7

That said six shares of the Capital Stock of Nephi National Bank are described as follows:

[fol. 32] Certificate No. 56, date May 28th, A. D. 1907, signed by E. R. Booth, Cashier, and J. S. Ostler, President, issued to Henry Forrest for one share.

Certificate No. 57, dated May 28, A. D. 1907, signed by E. R. Booth, Cashier, and J. S. Ostler, President, issued to Henry Forrest for five shares.

That, together with a certified copy of the said decree of distribution as aforesaid, distributiing the said six shares of capital stock to said Rhoda Forrest, said administrator has delivered said six shares of capital stock to said Nephi National Bank, to be held in trust for the estate of said Rhoda Forrest, deceased, and has filed with this petition the voucher of said Nephi National Bank evidencing such delivery.

8

That said administrator has paid all sum of money due from him, and has delivered up, under the order of this court, all property of the estate to the parties entitled thereto, and that he has performed all the acts required of him by law, that said estate has been fully administered and that he has filed vouchers, as provided by law in this court.

9

That said Ernest R. Forrest, Emma Lucile Hawkins and Mabel Ruth Lunt are all of the persons interested in the

estate of said Henry Forrest, deceased, and they hereby waive notice of hearing to be had upon this petition, and join said administrator in the same.

Therefore petitioners pray that said administrator be discharged from the further administration of said estate; and this bondsmen be released and discharged from liability; and that such order of discharge be made without notice.

(Signed) Ernest R. Forrest, Administrator. (Signed) Ernest R. Forrest, Son and Heir. (Signed) Emma Lucille Hawkins, Daughter and Heir. (Signed) Mable Ruth Lunt, Niece and Legatee. (Signed) Wm. A. C. Bryan, Attorney for Petitioners.

[fol. 33] STATE OF UTAH,
County of Juab, ss:

Ernest R. Forrest, being first duly sworn says that he is the duly appointed, qualified and acting administrator of the estate of Henry Forrest, deceased; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated upon information and belief and as to those matters, he believes it to be true.

(Signed) Ernest R. Forrest.

Subscribed and sworn to before me this 17th day of November, A. D. 1931. (Signed) Wm. A. C. Bryan, Notary Public. (Notarial Seal.) Residing at Nephi, Utah. My commission expires May 6th, 1934.

Filed November 18, 1931.

Nephi City, Utah, November 18th, 1931.

This is to certify that Nephi National Bank, a corporation organized and existing under and by virtue of the laws of the United States of America, has on this 18th day of November, A. D. 1931, received from Ernest R. Forrest, administrator of the estate of Henry Forrest, deceased, the following described certificates of the capital stock of said Bank, to-wit:

Certificate No. 56 date May 28th, A. D. 1907, signed by E. R. Booth, Cashier, and R. S. Ostler, President, issued to Henry Forrest for one share.

Certificate No. 57 dated May 28, A. D. 1907, signed E. R. Booth, Cashier, and R. S. Ostler, President, issued to Henry Forrest for five shares.

The said certificates and each of them to be held in trust for the estate of Rhoda Forrest, deceased.

Nephi National Bank, by Ralph Brough, C'hr.

Filed Nov. 18, 1931.

[fol. 34] IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF UTAH IN AND FOR THE COUNTY OF JUAB

In the Matter of the Estate of HENRY FORREST, Deceased

Decree of Final Discharge

The petition of Ernest R. Forrest, administrator of the estate of Henry Forrest, deceased, joined in by Emma Lucile Hawkins, daughter, and Mabel Ruth Lunt, niece of said decedent; they being all of the persons interested in said estate, coming on regularly for hearing, and it appearing that said estate has been fully administered, and that said administrator has paid all sums of money due from him, and has delivered up all property of said estate to the parties entitled thereto, in pursuance of the orders and decrees of this court, and has filed herein satisfactory vouchers thereof; and all persons interested in said estate having, in writing waived notice of this hearing and prayed that an order be made, without notice, discharging said administrator from the further administration of said estate, and that his bondsmen be released and discharged from liability to be hereafter incurred;

It is ordered, adjudged and decreed that said administrator be, and he is hereby discharged from further administering said estate, and his bondsmen are released from any liability to be hereafter incurred.

Dated December 1st, 1931.

Leroy H. Cox, Judge.

Filed December 3, 1931.

UNITED STATES OF AMERICA,
State of Utah,
County of Juab:

I, J. H. Vickers, County Clerk and Ex-Officio Clerk of the District Court in and for the County of Juab, State of Utah, do hereby certify that the above and foregoing is a full, true and correct copy if the original, Decree of Distribution, Decree Showing that Due and Legal Notice to Creditors has been Given, Order Authorizing Administrator to Release Mortgages, Decree Settling Inheritance Tax, Order Approving Account, Petition for Final Discharge of Administrator, Voucher of Nephi National Bank for Six Shares of Capital Stock, and Decree of Final Dis- [fol. 35] charge; In the Matter of the Estate of Henry Forrest, deceased, Probate File #427; as the same appears on record and on file in my office.

In witness whereof I have set my hand and affix my official seal, at my office in Nephi City, Juab County, Utah, this 28 day of April, A. D. 1933.

(Signed) J. H. Vickers, County Clerk and ex-officio Clerk of the District Court in and for Juab County. (Seal.)

DEFENDANT'S EXHIBIT 2

Nephi, Utah, Jun. 30, 1920.

No. 97-39

Nephi National Bank

Pay to the order of Henry Forrest, Estate, $30.00 Thirty Dollars Only Dollars for Dividend No. 24.

J. W. Boud, Cashier.

(Endorsed on reversed side as follows:)

Deposit to Mrs. Rhoda Forrest, Henry Forrest Estate, by E. R. Forrest, Adm.

PLAINTIFF'S EXHIBIT A

F. W. O.

Warranty Deed

Rhoda Forrest, Grantor of Nephi City, Juab County, Utah, hereby conveys and warrants to Emma Lucille Hawkins, Grantee, of Salt Lake City, Salt Lake County, Utah, for the sum of one ($1.00) Dollar and other valuable considerations, the following described tract of land, in Juab County, Utah, to-wit:

Beginning 68 rods ¾ feet West of the Southeast corner of Lot 1, Block 44, Plat "A", of the Nephi Survey of Building Lots; thence west 46 and ¾ feet; thence North 16 rods; thence East 46 and ¾ feet; thence South 16 rods to the place of beginning.

[fol. 36] This property comes to grantee as an heir at law of Henry Forrest, deceased.

Witness the hand of said grantor this 16th day of April, A. D. 1920.

Her
Rhoda X Forrest.
Mark

Signed in the presence of Thos. H. Burton, Sarah O. Luff.

STATE OF UTAH,
County of Juab, ss:

On this 16th day of April, A. D. 1920, personally appeared before me Rhoda Forrest, the signer of the above instrument who duly acknowledged to me that she executed the same.

Thos. H. Burton, Notary Public. (Seal.) My commission expires August 27th, 1921.

No. 29150 recorded at the request of R. H. Hawkins, Sept. 7th, 1921, at 11 A. M.

Geo. W. Lunt, County Recorder, by Mayme Riches, Deputy.

Warranty Deed

Rhoda Forrest, Grantor of Nephi City, Juab County, State of Utah, hereby conveys and warrants to Emma

Lucille Hawkins, Grantee, of the same place for the sum of one ($1.00) Dollar and other valuable considerations, the following described tract of land in Juab County, State of Utah, to-wit:

An undivided ½ interest of in and to the following property, to-wit:

Beginning at a point 60 feet 9 inches South of the Northwest corner of Lot 3, Block 36, Plat "A" of the Nephi Survey of Building Lots; thence running East 110 feet; thence South 6 feet 6 inches; thence East 52 feet; thence South 40 feet; thence West 162 feet; thence North 46 feet 6 inches to the place of beginning.

Together with all buildings and improvements located thereon or in any way appertaining thereto.

[fol. 37] Witness the hand of said Grantor this 20 day of March, A. D. 1920.

. . . .

Her
Rhoda X Forrest.
Mark

Signed in the presence of Thos. H. Burton, Sarah O. Luff.

STATE OF UTAH,
County of Juab, ss:

On this 20th day of March, A. D. 1920, personally appeared before me Rhoda Forrest, the signer of the above instrument who duly acknowledged to me that she executed the same.

Thos. H. Burton, Notary Public. (Notarial Seal.)
My commission expires August 27th, 1921.

No. 27422 recorded at the request of Thos. H. Burton, April 7, 1920, at 9 A. M.

Thomas Bailey, County Recorder.

Warranty Deed

Rhoda Forrest, grantor, of Nephi City, Juab County, State of Utah, hereby conveys and warrants to Ernest R. Forrest, Grantee, of the same place for the sum of one dollars and other valuable considerations, the following described tract of land situated in Nephi City, Juab County, Utah, and described as follows, to-wit:

Beginning at the Southwest corner of Lot 3, Block 20, Plat "A", of the Nephi Survey of Building Lots; thence North 3 rods; thence East 13 rods; thence South 3 rods; thence West 13 rods to the place of beginning.

Beginning 3 rods North of the Southwest corner of Lot 3, Block 20, Plat "A" of the Nephi Survey of Building Lots, thence running North 3½ rods; thence East 13 rods; thence South 3½ rods; thence West 13 rods to the place of beginning.

Together with all improvements located upon said premises.

The South ½ of Lot 4, Block 18, Plat "A", of Nephi Survey of Building Lots.

[fol. 38] Witness the hand of the said grantor this 16 day of April, A. D. 1920.

....

Her
Rhoda X Forrest.
Mark

Signed and delivered in the presence of Sarah O. Luff.

STATE OF UTAH,
County of Juab, ss:

On this 16 day of April, A. D. 1920, personally appeared before me Rhoda Forrest, the signer of the foregoing instrument who duly acknowledged to me that she executed the same.

Thos. H. Burton, Notary Public. (Seal.) My commission will expire August 27th, 1921.

This property comes to Grantee as an heir at law of Henry Forrest, deceased.

No. 27454 recorded at the request of E. R. Forrest, April 16, 1920, at 4:30 P. M.

Thomas Bailey, County Recorder.

Warranty Deed

Rhoda Forrest, Grantor, of Nephi City, Juab County, State of Utah, hereby conveys and warrants to Emma L. Hawkins, Grantee, of the same place for the sum of one ($1.00) dollar and other valuable considerations, the following described tract of land, in Juab County, State of Utah, to-wit:

Beginning 7 rods North of the Southeast corner of Lot 1, Block 44, Plat "A", of the Nephi Survey of Building Lots, thence West 68 feet 9 inches; thence North 3½ rods; thence East 68 feet 9 inches; thence South 3½ rods to the place of beginning.

Together with all improvements thereon.

This property comes to Grantee as an heir at law of Henry Forrest, deceased.

Witness the Hand of said Grantor this 16th day of April, A. D. 1920.

Her
Rhoda X Forrest.
Mark

Signed in the presence of Thos. H. Burton, Sarah O. Luff.

[fol. 39] STATE OF UTAH,
County of Juab, ss:

On this 16th day of April, A. D. 1920, personally appeared before me Rhoda Forrest, the signer of the above instrument who duly acknowledged to me that she executed the same.

Thos. H. Burton, Notary Public. (Seal.) My comsion expires August 27th, 1921.

No. 29151. Recorded at the request of R. H. Hawkins, Sept. 7th, 1921, at 11 A. M.

Geo. W. Lunt, County Recorder, by Mayme Riches, Deputy.

UNITED STATES OF AMERICA,
State of Utah,
County of Juab:

I, E. B. Sperry, Juab County Recorder in and for the County of Juab, State of Utah, do hereby certify that the above and foregoing is a full, true and correct copy of the original.

Warranty Deeds from Rhoda Forrest to Emma L. Hawkins; Rhoda Forrest to Emma Lucille Hawkins, and Rhoda Forrest to Ernest R. Forrest, also Warranty Deed from Rhoda Forrest, to Emma Lucille Hawkins, under date of March 20, 1920, as the same appears of record and on file in my office.

In witness whereof I have set my hand and affix my official seal, at my office in Nephi City, Juab County, Utah, this 28th day of April, A. D. 1933.

(Signed) E. B. Sperry, Juab County Recorder in and for Juab County, State of Utah. (Seal.)

PLAINTIFF'S EXHIBIT B

F. W. O.

Warranty Deed

Rhoda Forrest, Grantor of Nephi City, Juab County, State of Utah, hereby conveys and warrants to Ernest R. Forrest, Grantee of the same place for the sum of One [fol. 40] Dollar and other valuable considerations, the following described tract of land situated in Nephi City, Juab County, Utah, and described as follows, to-wit:

Beginning at the Southwest corner of Lot 3, Block 20, Plat "A" of the Nephi Survey of Building Lots; thence North 3 rods; thence East 13 rods; thence South 3 rods; thence West 13 rods to the place of beginning.

Beginning 3 rods North of the Southwest corner of Lot 3, Block 20, Plat "A" of the Nephi Survey of Building Lots, thence running North 3½ rods; thence East 13 rods; thence South 3½ rods; thence West 13 rods to the place of beginning.

Together with all improvements located upon said premises.

[Beginning 123 feet South of Northeast corner of Lot 4, Block 18, Plat "A", of Nephi Survey of Building Lots; thence South 103 feet more or less to the Southeast corner of said Lot 4; thence West 13 rods; thence North 103 feet more or less to a point due West of the place of beginning; Thence East 13 rods to place of] *

The South ½ of Lot 4, Block 18, Plat "A", Nephi Survey of Building Lots;

---

* [Matter enclosed in brackets erased in copy.]

Witness the Hand of the said grantor this 16 day of April, A. D. 1920.

Her
Rhoda X Forrest.
Mark

Signed and delivered in the presence of: (Signed) Sarah O. Luff.

STATE OF UTAH,
County of Juab, ss:

On this 16 day of April, A. D. 1920 personally appeared before me Rhoda Forrest, the signer of the foregoing instrument who duly acknowledged to me that she executed the same.

(Signed) Thos. H. Burton, Notary Public. (Seal.)
My commission will expire August 27th, 1921.

This property comes to Grantee as an heir at law of Henry Forrest, deceased.

[fol. 41] (On reverse side of Exhibit B is the following:)

No. 27454

Recorded April 16, 1920 at 4:30 P. M., in Book 90 of Deeds page 384 .
Thomas Bailey, Recorder, Juab County, Utah.

Recorded by P. N. Proof Read by B. & N.
Indexed Grantor F's. Grantee F's.
Abstracted Book Nephi 2. Page 588-52.
Fees Pd $1.00
Mail to E. R. Forrest, Nephi.

On the 29 day of April, 1933, the court denied the plaintiff's motion herein for a declaration of law and judgment in plaintiff's favor and granted judgment in favor of the defendant.

And the foregoing pages, consisting of 31 pages numbered from one to 31, inclusive, constitute and contain all the evidence and proceedings had on the trial of said cause and all of the same that is necessary or material in any way to a

consideration and review of the exceptions alleged and errors assigned and not otherwise appearing of record herein.

Dated this 26 day of May, 1933.

Will L. Hoyt, Attorney for Plaintiff.

Affidavit of Service by Mail

STATE OF UTAH,
County of Juab, ss:

Mabel Wilson being first duly sworn on oath deposes and says that she is a citizen of the United States over the age of twenty-one years:

That she is a stenographer in the office of Will L. Hoyt, plaintiff's attorney in the above entitled action.

That on the 26 day of May, 1933, she served the hereunto annexed Bill of Exceptions upon Claude F. Baker, Esq., attorney for defendant in said action, by enclosing a full, [fol. 42] true and correct copy of the hereunto annexed Bill of Exceptions in an envelope legibly addressed as follows:

"Mr. Claude F. Baker, Attorney at Law, Eureka, Utah"

and depositing the same with contents intact and postage fully prepaid thereon in due course of mails in the United Staes Post Office at Nephi, Utah; that there is a daily communication by mail between Nephi, Utah, and Eureka, Utah.

Mabel Wilson.

Subscribed and sworn to before me this 26 day of May, 1933. Will L. Hoyt, Notary Public. (Seal.) Residence, Nephi, Utah. My commission expires 10 May, 1934.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS . . . . . .

The foregoing Bill of Exceptions, consisting of pages numbered from one to 33, inclusive, having been duly proposed, served and lodged with the clerk of this court within

the time allowed by law and timely orders of the court, and all the amendments proposed therto by the plaintiff having been duly allowed and engrossed therein, and being now presented to the undersigned judge of said court, before whom said cause was tried, and said proceedings had, the same is now allowed, settled, signed and certified as a true and correct Bill of Exceptions in the said cause.

Dated at Salt Lake City, Utah, this 26 day of June, 1933.

Tillman D. Johnson, Judge.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed May 29, 1933

To the Honorable Tillman D. Johnson, Judge of the District Court of the United States for the District of Utah:

The plaintiff, Arch R. Jack as receiver of the Nephi National Bank, a corporation, herein designated as appellant, feeling aggrieved by the judgment rendered and entered in the above entitled action on the 29 day of April, 1933, does hereby appeal from said judgment as entered in the United States District Court for the District of Utah [fol. 43] to the United States Circuit Court of Appeals for the Tenth Circuit for the reasons set forth in assignment of errors filed herewith, and prays that this appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment is based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Tenth Circuit under the rules of said Court in such cases made and provided.

And petitioner further prays that, in accordance with the provisions of Title 28, Section 870, United States Code, this appeal may be allowed without any cost or supersedeas bond being required of appellant under said judgment and that all proceedings be stayed pending said appeal.

Dated this 27 day of May, 1933.

Will L. Hoyt, Attorney for Plaintiff and Appellant.

(Affidavit showing service by mail upon defendant's counsel 27 May, 1933, attached.)

[File endorsement omitted.]

In United States District Court

Assignment of Errors—Filed May 29, 1933

Comes now the plaintiff, Arch R. Jack as receiver of the Nephi National Bank of Nephi, Utah, hereinafter referred to as the appellant, and assigns the following errors which appellant avers occurred on the trial of this action and upon which the appellant relies to reverse the judgment entered herein the 29 day of April, 1933, to-wit:

1

That the court erred in denying plaintiff's motion for a declaration of law and judgment in plaintiff's favor.

2

That the court erred in denying plaintiff's motion to have the cause transferred to the equity side of the court, and in refusing to grant plaintiff's motion to impress the property described in the plaintiff's second amended complaint with a lien for the payment of the stockholders liability therein referred to and sought to be enforced.

[fol. 44]

3

That the court erred in granting defendant's motion for a declaration of law and judgment in favor of the defendant and dismissing the case.

4

That the judgment of the court entered herein was contrary to the law.

5

That the judgment of the court entered herein was contrary to the weight of the evidence.

Wherefore, the plaintiff and appellant, Arch R. Jack, receiver as aforesaid prays that the judgment of said District Court be reversed.

Will L. Hoyt, Attorney for Plaintiff and Appellant.

(Affidavit of service on defendant's counsel by mail 27 May, 1933, attached.)

[File endorsement omitted.]

In United States District Court

Order Allowing Appeal Without Bond—Filed June 26, 1933

It is ordered by the court that an appeal be, and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Tenth Circuit, the judgment heretofore rendered on the 29 day of April, 1933, in this action, and that such appeal may be taken by the plaintiff without cost or supersedeas bond and that execution herein be stayed pending such appeal or until the further order of the court.

Done in open court this 26 day of June, A. D. 1933.

Tillman D. Johnson, Judge.

Recital as to Citation and Service

[Citation in proper form, directed to appellee, was issued on August 9, 1933, and on August 12, 1933, service of said citation was accepted by counsel for said appellee.]

[fol. 45] In United States District Court

Præcipe for Transcript of Record—Filed August 24, 1933

Comes now Arch R. Jack as receiver of the Nephi National Bank of Nephi, Utah, plaintiff and appellant herein, and requests the clerk of the United States District Court for the District of Utah to certify a transcript of the record in the above entitled cause to the United States Circuit Court of Appeals for the Tenth Circuit by including therein the following:

1. Second Amended Complaint.
2. Demurrer to Second Amended Complaint.
3. Answer.
4. Reply.
5. Minute Entry of April 29, 1933.
6. Judgment dated April 29. 1933
7. Bill of Exceptions.
8. Plaintiff's Exhibit B (Original deed from Rhoda Forrest to Ernest R. Forrest).

9. Approval of Bill of Exceptions.
10. Petition for Appeal.
11. Assignment of Errors.
12. Order Allowing Appeal.
13. Election as to Printing.
14. Citation on Appeal.
15. This Præcipe.
16. Clerk's Certificate.

Dated at Nephi, Utah, this 11 day of August, 1933.
Will L. Hoyt, Attorney for Plaintiff and Appellant.

Service of above præcipe acknowledged this 11th day of August, 1933.
Claude F. Baker, Defendant's Attorney.

[fol. 46] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] In United States Circuit Court of Appeals, Tenth Circuit

Motion to Dismiss Appeal—Filed Nov. 10, 1933

Ernest R. Forrest, appellee, hereby enters a restricted appearance for purposes of this motion only, and moves to dismiss the appeal herein, upon the following grounds:

1. That the appeal herein is from a judgment rendered by a judge of the United States District Court for the District of Utah in an action at law, sitting without a jury. That no waiver of jury in writing was ever executed by any of the parties thereto, or filed in said cause, or made a part of the appeal record in this cause; that the pretended oral waiver of jury in said cause as shown by the transcript of record on page 15 is as follows:

"Upon stipulation in open court it was ordered that jury be waived * * *"

2. That appellant, at close of evidence at trial, failed to request special findings by the trial court of the facts es-

tablish. That the only request made by appellant is shown on page 24 of the transcript of record, and is as follows:

"Mr. Hoyt: The plaintiff now moves the court for a declaration of law and judgment in plaintiff's favor, and further moves the court, in case the court rules against plaintiff's contention as to the liability of defendant in a law action, that the cause be transferred to the equity side of the court, and that a decree be entered in favor of plaintiff impressing the property described in plaintiff's second amended complaint with a lien for the payment of the stockholder's liability referred to in said complaint."

3. That the appeal record is insufficient to permit a review of the judgment appealed from, and that this court is without jurisdiction to review said judgment for the reasons in this motion above stated.

4. That a copy of this motion has been served upon appellant. This motion is made on its contents, and the proof of service of this motion on appellant; upon all documents, records or papers now filed or hereinafter to be filed as a [fol. 48] part of the appeal record in this cause; and upon briefs or documents in support of this motion, and arguments in support of this motion, hereinafter to be presented to this court.

Wherefore, appellee prays that his motion to dismiss appeal be sustained.

Claude F. Baker, Eureka, Utah. Attorney for Appellee.

[File endorsement omitted.]

In United States Circuit Court of Appeals

Order of Submission—Jan. 24, 1934

This cause came on to be heard, Samuel W. Hayes, Esquire, appearing for appellant, no one appearing for appellee.

Thereupon this cause was argued by counsel for appellant on the motion to dismiss the appeal and on the merits and was submitted to the court.

In United States Circuit Court of Appeals, April Term, 1934

No. 944

[June 7, 1934]

Samuel W. Hayes (Will L. Hoyt was with him on the brief) for appellant.

Claude F. Baker was on the brief for appellee.

Before Lewis and Bratton, Circuit Judges, and Kennedy, District Judge

Opinion

Bratton, Circuit Judge, delivered the opinion of the court:

Henry Forrest died testate in 1917. At the time of his death he owned six shares of stock in Nephi National Bank of Nephi, Utah. They were issued and registered in his name and remained thus registered throughout the time re- [fol. 49] ferred to herein. They stood in his name at the time this suit was instituted. By will he bequeathed $1,000.00 to a niece and devised the remainer of his property as follows:

"All the rest, residue and remainder of all real and personal property, of any and every kind and nature whatever, owned by me at the time of my death, after satisfying the above-named directions and bequest, I give, devise and bequeath to my beloved wife Rhoda Forrest, for her sole use, behoof and benefit, in her support and maintenance for and during her natural life; and should my said wife leave, at the time of her death, any of said property, either real or personal, then I give, devise and bequeath all the rest, residue and remainder of all such property, real and personal of any and every kind and nature, to my beloved son Ernest R. Forrest and my beloved daughter Lucile Hawkins, to be equally divided between them, share and share alike."

The estate, excluding the stock, consisted of real and personal property of the approximate net value of $10,000.00. Ernest R. Forrest—son of decedent and defendant herein—was appointed and qualified as administrator with the will

annexed in March, 1918, and thereupon took possession of the property. During the administration proceedings he and his sister transferred their right, title and interest as remaindermen to their mother. On March 11th, 1920, the court having jurisdiction of the estate entered a decree reciting that all claims, accounts and taxes had been paid; that Ernest Forrest and Lucile Hawkins, heirs at law, had conveyed their interests to Rhoda Forrest, the remaining heir; that Rhoda Forrest thereupon became and was the sole owner of the property constituting the estate and directing that it be distributed to her. Defendant here, as administrator in that proceeding, thereupon delivered all of such property, including the stock, to his mother. He did not see the stock again until after she died in July, 1931. He then found it among her effects. About a month after the distribution had been made and while the administration proceedings were still pending, Rhoda Forrest conveyed by separate deeds to defendant and his sister certain parcels of land theretofore belonging to the estate, each deed reciting "this property comes to the grantee as an heir-at-law of Henry Forrest, deceased." Defendant paid no con-[fol. 50] sideration for the real estate which he thus acquired. He still owns it and it exceeds $2,000.00 in value. On November 18th, 1931, defendant filed a petition for his discharge as administrator. It was granted and the estate closed on December 4th, 1931.

The Nephi National Bank became insolvent and suspended business on December 1st, 1931—prior to the date on which the administration proceedings were closed and the administrator discharged. On March 8th, 1932, the Comptroller of the Currency laid an assessment against the stockholders of $100.00 for each share. That assessment, so far as it related to the stock in question, was not paid. The receiver of the bank thereafter instituted this action at law, pleading the facts in detail. It was alleged among other things that the duty rested upon defendant, while acting as administrator, to reserve sufficient of the assets of the estate to discharge the liability which might accrue through assessment, or to transfer the stock to a solvent distributee; that he did neither, but instead distributed all of the assets and that he acquired without consideration and now owns real estate formerly belonging to the estate exceeding in value the amount of the assessment in question. Personal judgment for $600.00 was sought.

After interposing certain admissions and denials, defendant pleaded in his answer that the stock had belonged to his mother since March 11th, 1920; that he distributed it to her in obedience to the decree of the court having jurisdiction of the estate; that the bank had knowledge of such facts and that on November 18th, 1931, he delivered the stock to the bank, taking a receipt for it reciting that it was to be held in trust for the estate of his mother.

Trial by jury having been waived, the case was tried to the court. Judgment was rendered for defendant. Plaintiff appealed.

Defendant presented a motion to dismiss the appeal on two grounds: first, that trial by jury was not waived in writing and, second, that plaintiff failed at the close of the evidence to request special findings of fact. The judgment recites that the parties stipulated in open court to waive trial by jury. Since the amendment of May 29th, 1930, written waiver is unnecessary. 28 U. S. C. A. §773; 46 Stat. 486. The recitation in the judgment that a jury [fol. 51] was waived sufficed. United States v. Perry 55 F. (2d) 819. The trial court in an action at law is not required to make special findings of fact. Hendrie v. Turpen, 50 F. (2d) 1049. The general finding made in this case was equivalent to a verdict of a jury. At the close of all evidence, plaintiff moved for a declaration of law and judgment in his favor. That was sufficient to present the questions raised on this appeal. Maryland Casualty Co. v. Jones, 279 U. S. 792; White v. United States, 48 F. (2d) 178. The motion is denied.

Addressing ourselves to the merits of the case, stockholders in a national bank are liable for the obligations of the bank, each to the amount of the par value of his stock, and a transfer of stock made within sixty days preceding failure of a bank to meet its obligations or with knowledge of impending failure does not absolve the transferor from liability. 12 U. S. C. A. §64. A person holding stock as executor or administrator is not personally liable as a stockholder, but the estate in his hands is liable in like manner and to the same extent as the testator or intestate would be if living and competent to act and hold the stock in his own name. Sec. 66, ibid.

One holding stock in a bank continues liable to assessment so long as the stock is allowed to remain registered in his

name, although he may have transferred it to another, unless the transfer is appropriately noted in the records of the bank. Cases so holding exist in multiplied numbers. There are certain exceptions to that general doctrine. The transferor is not liable where he makes a bona fide sale, endorses the certificate and requests an authorized officer of the bank to make the transfer on its records though the officer fails or neglects to do so, or where the stock is sold to an officer of the bank, accompanied by a blank transfer, and payment is made with funds of the bank. Perhaps other exceptions obtain, but none has application here.

Since the stock in question stood registered in the name of Henry Forrest at the time of his death, his estate became and remained liable for the assessment. The liability was contingent from the time he acquired the stock and caused it to be registered in his name until the assessment was imposed. It then became fixed but existed throughout that period and attached to the estate upon his death in the [fol. 52] meantime. And Rhoda Forrest, the distributee receiving the property belonging to the estate, took it burdened with the unextinguished liability even though the distribution was made prior to insolvency of the bank and before imposition of the assessment upon the holders of shares therein. Davis v. Weed, 7 Fed. Cas. 186; Witney v. Butler, 118 U. S. 655. The facts in Matteson v. Dent, 176 U. S. 521, were quite similar to those in this case. There, the stock stood in the name of the decedent at the time of his death. It was distributed to the widow and children. The bank subsequently became insolvent and suspended business. The assessment followed. The court held that the federal statute subjected the estate to liability although insolvency occurred after the demise of the shareholder and subsequent to distribution of the property, and that since the law of the State of Minnesota rendered distributees liable for the debts of an estate, each to the amount of his distributive share, the distributees in question were liable personally for the assessment. It required the two statutes—the state supplementing the federal—to render the distributees personally liable. But the only effect the statute of the state had was to make the allottees personally liable. It did not affect the liability of the estate. The federal statute rendered it liable despite the facts that the bank became insolvent after distribution had been made. That is the effect of the decision in that case. So here, it

must be held that the estate of Henry Forrest was liable for the assessment although the bank became insolvent and suspended business after the property had been distributed. And that liability carried with it an equitable lien upon the assets of the estate. Witters v. Sowles, 32 F. 130; Drain v. Stough, 61 F. (2d) 668.

Since Rhoda Forrest took the assets burdened with the obligation, the property or the proceeds thereof could be pursued into her hands. Witters v. Sowles, supra; Mann v. Kleisdorff, 16 F. (2d) 997; Luce v. Thompson, 36 F. (2d) 183. As distribution did not liberate the property in the hands of the distributee, certainly the subsequent conveyance to defendant did not discharge the land so conveyed because he acquired it without consideration and with full knowledge of all the facts.

Defendant never owned the stock. It never was registered in his name. Distribution of the assets in obedience to an order of the court having jurisdiction of the estate [fol. 53] and without fraud was not enough to constitute devastavit creating personal liability on his part. It is our conclusion, therefore, that he is not personally liable, but the property acquired from his mother, formerly a part of the estate, is subject to the obligation since its acquisition was effected without consideration and with knowledge of the undischarged liability.

Plaintiff's remedy was to proceed appropriately in equity to impress the property with the lien and to enforce it. Although the action originated as one at law for the recovery of a personal judgment, plaintiff presented a motion at the close of the evidence to transfer it to the equity docket and thereafter to impress such a lien upon the property if the court determined that he was not entitled to recover at law. The court should have sustained the motion. This court has power to make the transfer. Clarksburg Tr. Co. v. Commercial Casualty Co., 40 F. (2d) 626; Moon Motor Co. v. Moon, 58 F. (2d) 90. The facts were alleged in detail and the case was tried fully. Accordingly, there is no occasion for a retrial. In such circumstances, this court has the power and duty to make the transfer and, having done so, to consider the proceeding as one in equity. Irons v. Smith, 62 F. (2d) 644.

Defendant delivered the stock to the bank on November 18th, 1931. The bank has retained possession of it since that time. In an effort to extinguish liability, resort is

made to the well recognized doctrine that a transferor of stock in an insolvent national bank will not be held responsible for the neglect or carelessness of a bank or its officers in failing to make the transfer on the records of the bank where the transferor has done all that a prudent man would do. The contention is without effect here because the stock was thus deposited only thirteen days prior to the bank's suspension of business. Assuming that it was deposited with express direction to make the transfer on the records, that would be ineffective because the bank closed its doors and suspended business less than sixty days thereafter. Fletcher v. Porter, 20 F. (2d) 23; Jeffrys v. O'Neal, 64 F. (2d) 284. Furthermore, the receipt, upon which defendant relies, merely recites that the shares were held in trust for the estate of Rhoda Forrest. There is nothing in the receipt or otherwise in the record indicating that the bank was directed to note a transfer in its records.

[fol. 54] For the reasons stated the judgment is reversed, the cause transferred to equity and remanded with directions to enter a decree in conformity with the views herein expressed.

Reversed and Remanded.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DISSENTING OPINION

LEWIS, Circuit Judge, dissents:

This is an action at law to recover a personal judgment against Ernest R. Forrest based on an assessment of $600.00 made by the Comptroller on six shares of the capital stock of the Nephi National Bank of Nephi, Utah. Certificates for the six shares were issued to Henry Forrest on May 8, 1907, and have remained in his name ever since. He died testate August 17, 1917, and on March 9, 1918, his son, appellee here, was appointed administrator of his estate with the will annexed. The administrator made final settlement of the estate in Probate Court in March, 1920, and on the 11th day of that month the court entered an order approving his acts, closing the estate and directing him to turn over to Rhoda Forrest, widow of decedent all the property in his hands, specifically naming

it including said six shares of bank stock, which the administrator shortly complied with. That order is not subject to collateral attack. Stovall v. Banks, 10 Wall. 583; Simmons v. Saul, 138 U. S. 439; Barrette v. Whitney, — Utah, —, 106 Pac. 522.

The bank suspended business on December 1, 1931. The Comptroller by his order found the bank to be insolvent on January 26, 1932, and appointed a receiver that day. By his order he assessed all of its stock 100% on March 8, 1932, payable April 15, 1932.

The decedent bequeathed $1000.00 to a niece and devised all the remainder of his property as follows:

"All the rest, residue and remainder of all real and personal property, of any and every kind and nature whatever, owned by me at the time of my death, after satisfying the above-named directions and bequest, I give, devise and bequeath to my beloved wife Rhoda Forrest for her sole use, behoof and benefit, in her support and maintenance for and during her natural life; and should my said wife leave, at the time of her death, any of said property, [fol. 55] either real or personal, then I give, devise and bequeath all the rest, residue and remainder of all such property, real and personal of any and every kind and nature, to my beloved son Ernest R. Forrest and my beloved daughter Lucile Hawkins, to be equally divided between them, share and share alike."

Henry Forrest's estate consisted of real and personal property of an approximate value of $10,000.00 over and above debts and costs of administration.

Rhoda Forrest died in July, 1931, and after her death her son, the appellee, next saw the stock certificates in a small box which she had kept at her home. That was eleven years after all the property had been delivered to her under the order of distribution.

It will be observed that the stockholder died in August, 1917; that appellee as administrator made his final settlement in March, 1920; that on the 11th day of that month the court entered its order approving his acts, closing the estate, and directing him to turn all the property in his hands over to Rhoda Forrest. There was no proof that any other property belonging to the estate came into his hands as administrator thereafter. The finding of insolv-

ency and the making of the assessment by the Comptroller were approximately twelve years after the estate was closed and its assets distributed in accordance with the will. The Acts of Congress (12 U. S. Code, Secs. 63 and 64) provide the double liability of shareholders, and section 66 thereof reads in this way:

"Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name."

Later sections provide for the procedure to be taken by the Comptroller, but it is to be observed that section 66 exempts those in representative capacity from personal liability for the assessment and restricts their liability to the assets and funds in their hands. Notwithstanding what was said in Matteson v. Dent, 176 U. S. 521, we must [fol. 56] now take the liability as a statutory one. McDonald v. Thompson, 184 U. S. 71; McClaine v. Rankin, 197 U. S. 154; Christopher v. Norvell, 201 U. S. 216, 225; Page v. Jones, 7 F. (2) 541, 544. No liability exists under the statute, nor cause of action accrues until a finding of insolvency and assessment made by the Comptroller. In McDonald v. Thompson, supra, the court said: "In such cases no debt becomes due to the receiver as such until a deficiency has been ascertained and an assessment made, * * *." In Rankin v. Barton, 199 U. S. 228, 232, the court said: "In other words, the liability dates from the order of the Comptroller."

Both of those findings were made in this case in 1932, long after the estate was closed and all of its assets were distributed, and according to the undisputed testimony nothing had occurred prior to December 1, 1931, when the bank closed its doors, which caused appellee or would have caused any reasonable person to suspect that it was in an insolvent condition or might become so; and that was almost eleven years subsequent to the distribution of the assets of the estate. I am therefore unable to see any ground on which appellant can maintain his contention that the case comes within the terms of said section 66.

There was no estate, no part of Henry Forrest's estate, in the hands of appellee when insolvency occurred and assessment was made, nor for many years prior thereto. Cases that have been held to come within the scope of said section are those where the stockholder died prior to insolvency and the making of the assessment and when the estate was not fully administered, and the assets remaining unadministered were made subject to the assessment. Zimmerman v. Carpenter, 84 F. (2) 747; Luce v. Thompson, 36 F. (2) 183. The application of said section to that condition is obvious. As said in the Zimmerman case, "if no liability on the stock arises until after the estate is fully distributed then there would be no estate to be charged." For twelve years prior to the assessment in this case there had been no estate of Henry Forrest, but it is said there was a lien on the property of the estate of Henry Forrest for the satisfaction of this assessment. No lien is given by statute, although the liability is fixed by statute. The lien is said to be equitable. In Hodges v. Meriwether, 55 F. (2) 29, 31, a like contention was made by the receiver. In response thereto the court said: "But [fol. 57] no lien, equitable or otherwise, attached to this property while it was the property of the estate and it passed to her clear of any such lien." Zimmerman v. Carpenter, supra, cited to sustain a contrary conclusion in Drain v. Stough, 61 F. (2) 668, does not support that view. The statement in Mann v. Kleisdorff, 16 F. (2) 997, 998, that in event an assessment is made after the running of the local statute of limitations the receiver could pursue his remedy against funds of decedent "into whosoever hands they might have come," is obiter. Moreover, it does not appear that there were no funds of the estate in the hands of the executrix at the time the assessment was made, as here. There were no liens, at common law without possession by the one claiming the lien. "Its policy was to discountenance secret liens inasmuch as they hinder trade and restrict the safe and speedy transfer of property." It is true that the creditors of a bank, whom the receiver here represents, had an equitable lien on the capital stock of the bank,—the funds paid in or to be paid in on subscription therefor, and those to be paid on this assessment; but it certainly cannot be that such a lien extends to all of the other property of each stockholder.

Pomeroy's Equity Jurisprudence, Section 1234, is in part this:

"The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with, or in some manner relate to, specific property, such as a tract of land, particular chattels, or securities, a certain fund, and the like."

I find no authority sustaining the proposition that creditors of the corporation have an equitable lien on property of the stockholders aside from his interest in its capital stock. That lien, as pointed out by Cook on Corporations and other text writers, may be created by statute, by charter, or possibly by by-law or contract. There being no property or funds belonging to the estate of Henry Forrest in the hands of appellee as administrator at the time liability for the assessment arose and the cause of action accrued, nor for more than eleven years prior thereto, there was no *res* to which the asserted lien could attach nor assets of the estate to be followed into the hands of distributees. Moreover, the statute of Utah, section 7673 of the Laws of 1917, provides:

[fol. 58] "When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid or upon the heirs, devisees, or legatees to contribute to the payment of his claim; * * *."

This statute is contrary to the statute of Minnesota relied upon in Matteson v. Dent, supra, which sustained the right to recover in that case. Matteson, a National bank stockholder, died in July, 1895, intestate while residing in Saint Paul, Minnesota. The Probate Court there approved a final accounting in the administration of his estate in September, 1896, and entered a decree turning it over to his heirs. Thereafter in that year the bank became insolvent and an assessment was made against his shares by the Comptroller in January, 1897. The heirs were sued by the bank's receiver to recover the distributive shares received by them or so much thereof as might be necessary to satisfy the assessment. The action was brought in a state court

of Minnesota and was based on its statute, which provided that an action might be brought against all or part of the next of kin of deceased by his creditors to recover the distributive shares received by them out of an estate, or so much thereof as might be necessary to satisfy a debt of the intestate or his estate. Recovery was affirmed by the Supreme Court of Minnesota, 73 N. W. 416 and 75 N. W. 1041. The Supreme Court of the United States in that case (Matteson v. Dent, 176 U. S. 521) said at pages 529, 530: "Whether the effect of the allotment (distribution of the estate) was to extinguish the estate, was wholly dependent on the Minnesota law." The estate of Henry Forrest was extinguished by the Utah statute on the order of distribution and its execution, and the property thereof in the hands of the distributees and their grantees was beyond the reach of said section 66, supra. In Zimmerman v. Carpenter, 84 Fed. 747, 751, Judge Carland, in construing said section 66, makes this statement: "if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." In Luce v. Thompson, supra, recovery was based in part on the opinions of the Supreme Court of Iowa wherein that court had applied the same rule that was set up by the [fol. 59] statute of Minnesota, permitting creditors to pursue the property of the decedent into the hands of the distributees in satisfaction of their claims.

It has been noted that the assessment of the Comptroller was for the full 100% of the face value of the stock. The complaint, parts of which are quoted in the majority opinion, seems to assume that appellee by his conduct became a stockholder in his father's stead and may be sued as such. I cannot agree with the assumption nor the conclusion therefrom, but accepting it for present purposes, then, in that event suit to recover by a receiver can only be at law and not in equity. Aufdenkamp v. L'Herrison, 56 F. (2) 344, and cases there cited.

There is another matter. Where section 66, supra, applies no lien can be adjudged by a court out of possession against property in the exclusive and lawful custody of a court of another jurisdiction, and no final judgment can be entered by such a court that would authorize the levy of an execution upon it, because it is already in custodia legis. The only remedy that can be afforded by a court to enforce

an assessment under the conditions set up in said section 66 is to allow the claim and provide that it be satisfied out of the property in the hands of the administrator. This is clearly pointed out by Judge Shiras in Wickham v. Hull, 60 Fed. 327. In my opinion the judgment of the District Court should be affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

Before Honorable Robert E. Lewis and Honorable Orie L. Phillips, Circuit Judges

JUDGMENT—June 7, 1934

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Utah and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby re- [fol. 60] versed; that this cause be and the same is hereby transferred to the equity side of the docket and remanded to the said District Court with directions to enter a decree in conformity with the views expressed in the opinion of this court; and that Arch R. Jack, as Receiver of the Nephi National Bank of Nephi, Utah, a corporation, appellant, have and recover of and from Ernest R. Forrest, appellee, his costs herein and have execution therefor as at law.

IN UNITED STATES CIRCUIT COURT OF APPEALS

MOTION OF THE APPELLEE FOR AN ORDER STAYING MANDATE —Filed July 5, 1934

Your petitioner, Ernest R. Forrest, appellee herein, respectfully presents this, his application for an order staying the issuance of the mandate for thirty days pending application by your petitioner to the Supreme Court of the United States for a writ of certiorari, and in support thereof presents the following:

1. That the decision of the aforesaid court in said cause was made and entered on June 7, 1934.

2. That the matters invoked in said cause are as shown by the files and records of said cause and the decision of the aforesaid court, and the dissenting opinion in said cause.

3. That the reasons for allowance of said order are to permit your petitioner to make application to the Supreme Court of the United States for a writ of certiorari based, among other things, upon the reasons set forth in the dissenting opinion in said cause. That your petitioner has ordered and furnished funds for the necessary printed record copies required by his said application for a writ of certiorari.

Wherefore, your petitioner prays that a writ of mandate be stayed for thirty days from and after July 12, 1934.

Respectfully submitted, Claude F. Baker, James H. Pierce, Attorneys for Petitioner.

[File endorsement omitted.]

[fols. 61 & 62] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—July 5, 1934

This cause came on to be heard on the motion of appellee for a stay of the mandate herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that said motion be and the same is hereby granted and that no mandate of this court issue herein for a period of thirty days from this day, and that, if within said period of thirty days there is filed with the clerk of this court a certificate of the clerk of the Supreme Court of the United States that a petition for writ of certiorari, record and brief have been filed, with proof of service thereof under Section 3 of Rule 38 of the Supreme Court, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,842. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 214. Ernest R. Forrest, Petitioner, vs. Arch R. Jack, as Receiver of the Nephi National Bank of Nephi, Utah. Petition for a writ of certiorari and exhibit thereto. Filed July 23, 1934. File No. 214, O. T., 1934.

In the

Supreme Court of the United States

October Term 1934.

No. 214

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION,

Respondent,

vs.

ERNEST R. FORREST,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND SUPPORTING BRIEF.

JAMES F. PIERCE,
CLAUDE F. BAKER,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term 1934.

No.....

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION,

Respondent,

vs.

ERNEST R. FORREST,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Ernest R. Forrest, petitioner, complains of a decree of the United States Circuit Court of Appeals for the Tenth Circuit, made final in that Court on June 7, 1934, (unreported. R. 48, 59), and respectfully petitions for a writ of Certiorari to review the same.

In this behalf your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Respondent, on November 9, 1932, in his capacity as receiver of a national bank, filed action at law seeking recovery from petitioner of six hundred dollars and interest (R. 3, 9). The cause was tried to the court, a jury having been waived (R. 15). Judgment was rendered for petition-

er (R. 16), and respondent appealed from the Utah Federal District Court to the Tenth Circuit Court of Appeals (R 42, 43).

By his action, respondent sought to recover a personal judgment against petitioner based on an assessment of $600.00 made by the Comptroller on six shares of the capital stock of the Nephi National Bank of Nephi, Utah, (R.7). Certificates for the six shares were issued to Henry Forrest on May 8, 1907, and have remained in his name ever since. He died testate on August 17, 1917, and on March 9, 1918, his son, petitioner here, was appointed administrator of his estate with will annexed (R. 3). The administrator made final settlement of the estate in Probate Court in March, 1920, and on the 11th day of that month the court entered an order approving his acts, closing the estate and directing him to turn over to Rhoda Forrest, widow of the decedent, all the property in his hands, specifically naming it including the six shares of bank stock, which the administrator shortly complied with. (R. 25, 29).

The bank suspended business on December 1, 1931. The Comptroller by his order found the bank to be insolvent on January 26, 1932, and appointed a receiver on that day. By his order he assessed all of its stock 100 per cent on March 8, 1932, payable April 15, 1932. (R. 8, 9).

The decedent bequeathed $1000.00 to a niece and devised all the remainder of his property to his wife for her sole use and benefit during her life; and in event his wife left any property at time of her death, then such property was devised and bequeathed to petitioner and his sister equally. (R. 5).

Henry Forrest's estate consisted of real and personal property of an approximate value of $10,000.00 over and above all debts and costs of administration. (R. 20).

Rhoda Forrest died in July, 1931, and after her death

petitioner next saw the stock certificate in a small box which she kept at her home. That was eleven years after all the property had been delivered to her under the order of distribution. Defendant delivered the stock to the bank and on November 18, 1931, the bank issued its receipt (R. 33), filed that day in the probate court to the effect that the bank held the stock certificates in trust for the Estate of Rhoda Forrest, Deceased. (R. 18).

Some time prior to the decree of distribution in the Henry Forrest Estate, petitioner and his sister transferred their rights as remainder men to their mother, Rhoda Forrest (R. 19). About a month after the decree of distribution, early in 1920, Rhoda Forrest conveyed by separate deeds to petitioner and his sister certain lands formerly in the Henry Forrest Estate. (R. 35, 41).

The case was brought and tried at law seeking recovery from petitioner personally of the assessment amount on the theory that the facts constituted devastavit (R. 1, 9) The case was defended on the issues as made and not upon the equitable issues to impress the property deeded petitioner with any lien (R. 10, 13). Indeed, the other parties, presently interested in the realty, were not before the court, and equitable defenses, or proof thereof, were necessarily not competent, relevant, or material to the aforesaid issues made and tried. At close of trial, after the parties had rested, respondent in his motion for judgment included a request that the cause be transferred to equity, and petitioner's property be impressed with a lien. The trial court denied this motion (R. 24).

The appeal decision, unreported as yet, was by a divided court, Judge Lewis dissenting. The decision held that the facts, although insufficient to constitute devastavit, were sufficient to impress with a lien petitioner's property deeded him by his mother in 1920; that the judgment of the lower court should be reversed, the cause transferred to

equity, and remanded to enter a decree. (R. 48, 59).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Your petitioner respectfully submits that the present case is one in which this Court should issue a writ of certiorari for the following reasons:

1. Public policy and the public welfare require that secret liens affecting realty titles established and relied upon for over a decade, should be unfavorably regarded. The possibility of such liens springing into existence years afterwards is to detract from realty values, to detriment trade, and to add uncertainty to that which public policy demands should be certain: such as titles to homes, etc. The policy of the common law, based on immemorial experience, was to "discountenance secret liens inasmuch as they hinder trade and restrict the safe and speedy transfer of property" (R. 57). Surely the policy of our law in modern development, is to simplify realty transactions and to promote confidence through certainty. In the case at bar no liability existed prior to a finding of insolvency and assessment made by the Comptroller. The liability is statutory and dates from the Comptroller's order (R. 55,56). The decision here complained of impresses an equitable lien on realty which has been clear and secure in the hands of a distributee's grantee for more than eleven years. This lien is impressed in a law action, tried on tortious issues, where no res of the estate has been in existence or possession of the administrator in over eleven years, and despite a definite holding that petitioner's conduct does not constitute a devastavit.

2. It is believed that the decision in effect tends to impair the full force and effect of Section 102-9-28 Revised Statutes of Utah 1933 (then in effect as Section 7673 of the Compiled Laws of 1917) which provides in part:

> "When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees to contribute to the payment of his claim..."

in that the decision permits respondent, where no res of the estate has existed in eleven years, and the order provided by the above statute has been entered and unquestioned more than eleven years, to impress realty in the hands of the grantee of a distributee with a creditor's claim nonexistent for eleven years after the grant and probate order.

3. It is believed that the effect of the decision is materially to conflict with other federal decisions, to-wit: Hodges v. Meriwether, 55 Fed. (2) 29, 31, which says "But no lien, equitable or otherwise, attached to the property while it was property of the estate, and it passed to her clear of any such lien" (R. 56, 57); Zimmerman v. Carpenter, 84 Fed. (2) 747, (R. 56) in which it was said "If no liability on the stock arises until after the estate is fully distributed then there would be no estate to be charged"; and Matteson v. Dent, 176 U. S. 521 (R. 58), in which it was said at pages 529, 530: "Whether the effect of the allotment (distribution of the estate) was to extinguish the estate was wholly dependent on Minnesota law."

4. It is believed the decision in effect deprives petitioner of his day in court upon equitable issues not tried by the court below. Because respondent erred in presenting his case at law instead of in equity, petitioner is deprived of a substantial right to present his evidence upon issues assumed by the decision and never fully presented to, or tried by the trial court.

WHEREFORE, your Petitioner prays that a Writ of Certiorari be issued out of, and under the seal of, the Honorable Court directed to the United States Circuit Court of

Appeals for the Tenth Circuit, commanding that Court to certify, and to send to, this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 944, Arch R. Jack, as Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, Appellant, vs. Ernest R. Forrest, Appellee, and that the said decree of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray.

ERNEST R. FORREST, by

JAMES F. PIERCE,

CLAUDE F. BAKER, of Counsel,

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

October Term 1934.

No.....

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION,

Respondent,

vs.

ERNEST R. FORREST,

Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIONARI.

I.

THE OPINION OF THE COURT BELOW

The opinion in the Circuit Court of Appeals for the Tenth Circuit is unreported. It appears in the Record at pages 48 to 54. The dissenting opinion by Judge Lewis appears in the record at pages 54 to 59, and is adopted as a complete brief for petitioner's position.

II.

JURISDICTION.

1. The date of the decree to be reviewed is June 7, 1934, (R. 59, 60).

2. This cause was filed originally in the District Court of the United States in and for the District of Utah by respondent, as receiver of a national bank, seeking recovery

from petitioner of an assessment on six shares of national bank stock. The Circuit Court of Appeals, by divided court, reversed the judgment in favor of petitioner, and transferred the cause of equity, remanding same with directions to enter a decree impressing petitioner's lands with the amount of the assessment. (R.54).

Your petitioner claimed that since the cause was an action to hold petitioner liable for devastavit, no equitable decree could be entered. The Circuit Court of Appeals found and held there was no devastavit (R. 52, 53). Petitioner further claimed that in any event no lien existed against the realty of petitioner, deeded him by his mother, distributee of the Henry Forrest Estate. The judgment of the Tenth Circuit Court of Appeals was that petitioner was not personally liable but that petitioner's realty is impressed with a lien in the amount of the assessment (R. 59, 60).

3. This application for a Writ of Certiorari is made under Sec. 240 of the Judicial Code (U. S. C. Tit. 28, Sec. 347).

III.

STATEMENT OF THE CASE.

A full statement of the case has been made in the Petition for Certiorari and in the interest of brevity we refer now to the essential points, namely: The Circuit Court of Appeals held that petitioner was not personally liable (R. 52, 53), but that his realty, received as a grantee of the distributee of the Henry Forrest Estate, is impressed with a lien for the assessment on national bank stock in the name of Henry Forrest, although all assets of the estate were distributed by probate order more than eleven years prior to the assessment order, and petitioner received and recorded his deed more than eleven years prior to the order. (R. 48, 54).

The cause was brought and tried on issues in a law

case, and same was not tried on equitable issues. (R. 1, 15).

IV.

SPECIFICATION OF ERRORS.

1. The court erred in finding and holding that the judgment of the lower court should be reversed, the case transferred to equity and remanded with directions to impress a lien upon petitioner's realty, and awarding a cost judgment against petitioner.

2. The court erred in holding and finding that the decree of the lower court should not be affirmed, and should be reversed.

3. The court erred in finding and holding that respondent's remedy was to proceed appropriately in equity to impress the realty of petitioner with a lien and to enforce it.

4. The court erred in finding and holding that with respect to equitable issues "the facts were alleged in detail, and the case tried fully" (R. 53).

5. The court erred in holding that the assessment liability constituted a lien, equitable or otherwise.

V.

ARGUMENT.

Point A.

The assessment liability constituted no lien, equitable or otherwise, under the facts of the case.

The stock was in the name of Henry Forrest, Deceased. His estate was distributed by order of the Utah probate court more than eleven years before the Comptroller's assessment. The liability for this assessment is statutory, and it does not exist until a finding of insolvency and an assessment made by the Comptroller.

The Dissenting Opinion (R. 55, 56).
McClaine v. Rankin, 197 U. S. 154.

McDonald v. Thompson, 184 U. S. 71.
Christopher v. Norwell, 201 U. S. 216, 225.
Page v. Jones, 7 Fed. (2d) 541, 544.
Rankin v. Barton, 199 U. S. 228, 232.

Under Utah law (Section 102-9-28 Revised Statutes of Utah, 1933, formerly Section 7673 of the Compiled Laws of Utah 1917) in an estate where an order for debt payment and distribution has been made, no creditor can call upon other creditors, heirs, devisees or legatees. (R. 58). Such an order was more than eleven years old in the Henry Forrest Estate before the liability came into existence. There was no res to which a lien could have attached. Where section 66 of 12 U. S. Code has application there can be no lien because the property against which a lien is to be asserted is in the custody of another court, to-wit: the state probate court. The probate court having acted and distributed the assets of the estate lawfully, there is no res left upon which an assessment lien can be asserted eleven years afterwards. Judge Carland, in construing Section 66, in Zimmerman v. Carpenter, 84 Fed. (2) 747, 751, makes this statement: "If no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." (R. 58).

Point B.

The lien should not be asserted against property in the hands of a grantee of the distributee of the Henry Forrest Estate.

Petitioner held his property by promptly recorded grant from the distributee after the decree of debt payments and distribution had been formally entered in the probate court. It is respectfully submitted that cases which permit the following of assets in the hands of heirs are without application to this situation; and where such equitable proceeding is permitted, there are state statute specifically authorizing it, such as the Minnesota statute in the

case of Matteson v. Dent, 176 U. S. 521, which is directly opposed to the Utah statute supra, and to Utah law. There was no estate in petitioner's hands for eleven years when the assessment was made. Petitioner had fully and lawfully performed his duties as administrator with will annexed specifically as commanded by court order. Cases coming within the scope of Section 66 of 12 U. S. Code are those where a stockholder died prior to insolvency and the making of the assessment and when the estate was not fully administered. (R. 56). The assets remaining unadministered were made subject to the assessment. (R. 56) Zimmerman v. Carpenter, 84 Fed. (2) 747; Luce v. Thompson 36 Fed. (2) 183. In Hodges v. Meriwether, 55 Fed. (2) 29, 31, the court said: "But no lien, equitable or otherwise, attached to this property while it was the property of the estate and it passed to her clear of any such lien." (R. 56, 57).

Point C.

The case should not have been remanded to the equity side and a decree entered.

It is respectfully submitted that petitioner was without opportunity at trial to present defense upon the different issues assumed.

The decision says (R. 53) "The facts were alleged in detail and the case tried fully." It is submitted that the case was fully tried only upon the devastavit issues. Equitable defenses, and the proof of equitable issues, were not before the trial court. True it is that the second amended complaint alleged that petitioner surrendered his interests as remainderman in certain specific property in consideration of his mother receiving title by distribution and later deeding the tracts to him. (R. 5, 6). The receiver's proof failed on this issue and the specific proof is to the contrary (R. 19). This is the only issue made with respect to this specific property. The consideration petitioner paid later to his mother in taking care of her in enfeebled and blinded

conditions for eleven years was not before the court or in any way connected with the issues tried. Under the issues as existed, it was not competent, relevant or material to establish the fact that Rhoda Forrest's estate was insufficient in any part to respond to the assessment. It is submitted that the receiver's error, if any, in bringing a law action instead of an equitable suit, has directly benefitted him to the extent that it misled the lower court in trying a different case and petitioner in presenting only defenses at law. The decision, as did the lower court, finds that petitioner is not liable in devastavit which is the only case ever tried (R. 52, 53). It is respectfully submitted that the equitable case, to determine the lien found by the decision of the Circuit Court of Appeals has never been tried. All necessary parties have not been before any court.

The Writ of Certiorari should be issued.

Respectfully submitted,

JAMES F. PIERCE,

CLAUDE F. BAKER, of Counsel,

Attorneys for Petitioner.

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SUPPLEMENTAL BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 214.

ERNEST R. FORREST, *Petitioner,*

vs.

ARCH R. JACK, AS RECEIVER OF THE NEPHI NATIONAL BANK OF NEPHI, UTAH, A CORPORATION, *Respondent.*

SUPPLEMENTAL BRIEF FOR PETITIONER.

JAMES F. PIERCE,
CLAUDE F. BAKER, *of Counsel,*
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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SUPPLEMENTAL BRIEF FOR PETITIONER.

To avoid repetition, and in the interest of brevity, this brief supplements the brief heretofore filed in support of petition for writ of certiorari.

The opinion of the court below is now reported in 71 Fed. (2) 264.

The argument is divided in two parts, as follows:

1. The case should not have been remanded to equity, a decree entered, and a cost judgment entered against petitioner personally.

2. The stock assessment established no lien against the realty. First, no lien should be asserted against the realty; and, second, the stock assessment gave rise to no lien.

These matters of argument will be considered in order.

THE CASE SHOULD NOT HAVE BEEN REMANDED TO EQUITY, A DECREE ENTERED, AND A COST JUDGMENT ENTERED AGAINST PETITIONER PERSONALLY.

The case was instituted as a law action and was tried as such on issues of law. The cause as presented to, and tried by the trial court, proceeded on the theory that petitioner was personally liable in damages for devastavit. The majority opinion of the court below recites:

> "Defendant never owned the stock. It was never registered in his name. Distribution of the assets in obedience to an order of the court having jurisdiction of the estate and without fraud was not enough to constitute devastavit creating personal liability on his part. It is our conclusion, therefore, that he is not personally liable, but the property acquired from his mother, formerly a part of the estate, is subject to the obligation since its acquisition was effected without consideration and with knowledge of the undischarged liability."

Therefore the law issues, tried below, were decided in petitioner's favor by the above opinion. The conclusion that petitioner "is not personally liable" seems to require that petitioner should not be held personally liable for the cost judgment entered against him personally below.

But the majority opinion decides the cause on equitable issues, stating that "The facts were alleged in detail and the case tried fully". It is submitted that the equity issues were not properly pleaded or submitted to the trial court since equitable defenses would not have been competent or allowed in the law action tried. It is further sub-

mitted that to impress realty with a lien in a law action where petitioner is unable under ordinary rules of pleading to present his defenses fully is to deprive petitioner of his day in court. The cause as tried below, considered as a suit to determine a lien affecting title to realty is fatally defective since it does not appear in the second amended complaint that all parties actually interested in such title were before the trial court. In reality many parties with rights in such title existed and should have been made parties defendant to the suit. In 20 R. C. L. 704, it is said:

> "The general rule in equity as to parties defendant is that if all persons whose interests will be affected by decree sought to be obtained, that is, all necessary parties, cannot be reached by process, do not voluntarily appear, or from a jurisdictional objection going to the persons in the courts of the United States cannot be made parties, the bill must be dismissed. If the interests of those present and those absent are inseparable, the obstacle is insuperable." (The footnotes cite numerous U. S. Supreme Court decisions.)

The majority decision below states petitioner acquired the property without consideration. The issue of consideration, while not relevant to the issues of law joined, nevertheless was briefly covered by proof. The only competent evidence in the case is as follows:

Tr. Record Circuit Ct. Appeals, page 20:

> Q. You gave nothing for it; you received it as a gift, you say, from your mother?
>
> A. No cash consideration, no.
>
> Q. Nor any other consideration excepting your assignment to your mother?
>
> A. That I was to take care of her for the rest of her life.

The record shows that petitioner's mother died in July, 1931, and the transfers were made to petitioner by his mother in early 1920. It would seem that petitioner paid a high consideration for the property through taking care

of his mother for over eleven years. At least the state of the proof hardly justifies the statement in the opinion below that "its acquisition was effected without consideration and with knowledge of the undischarged liability". It is respectfully submitted that to impress a first and prior lien against the realty is to impair substantial property rights without due process of law. The error in presenting a law action to the trial court was made by the receiver, and such error is not properly charged to the trial court or usable as a basis to penalize petitioner.

It is believed, therefore, that the equitable cause determined by the court below was not properly presented to the trial court; that petitioner has never had opportunity to present his equitable defenses and relevant testimony; that the necessary parties were never before any court; that the only cause tried was affirmed by the court below; and that if petitioner is not personally liable under the issues tried, a cost judgment should not be entered against him.

(Point C of Petitioner's Brief, pages 11-12.)

PART II.

THE STOCK ASSESSMENT ESTABLISHED NO LIEN AGAINST THE REALTY. FIRST, NO LIEN SHOULD BE ASSERTED AGAINST THE REALTY; AND, SECOND, THE STOCK ASSESSMENT GAVE RISE TO NO LIEN.

The argument here is thoroughly covered by the dissenting opinion of Judge Lewis in 71 Fed. (2) 264, this cause below.

Points A and B, pages 9-11 of the Petitioner's Brief filed herein are further referred to.

As pointed out in the dissenting opinion, and the authorities therein cited, and those cited on pages 9-10 of Petitioner's Brief, the liability for the assessment is statutory, and does not exist until a finding of insolvency and an assess-

ment made by the Comptroller. Therefore, any lien which could have resulted from the assessment was not called into existence prior to 1932.

When petitioner's father died in 1917 his will made petitioner's mother sole beneficiary with exception of a $1000.00 bequest to a niece and a provision to divide any propery remaining on death of petitioner's mother between petitioner and his sister. Petitioner was appointed with will annexed of his father's estate in 1918, and in 1920 the probate court approved his acts, and distributed the complete remaining property of the estate, including six shares of the bank stock, to petitioner's mother. The distribution was made by the probate court as directed by the will. Some time prior thereto, petitioner and his sister surrendered their uncertain rights under the will to their mother. No claim for bank stock assessment existed at the time, and there was no way under any theory of law that petitioner could have prevented the distribution. There was no unpaid estate claim or liability. The majority opinion below states:

> "Distribution of the assets in obedience to an order of the court having jurisdiction of the estate and without fraud was not enough to constitute devastavit creating personal liability on his part."

It seems to be a conceded point in the case that there was no lawful duty unperformed by petitioner or maladministration of his father's estate.

It might be well to consider if a lien for a 1932 stock assessment liability could have attached to any assets of the estate during administration. These assets were in the exclusive and lawful custody of the state probate court. The last paragraph of the dissenting opinion says:

> "There is another matter. Where section 66, supra, applies no lien can be adjudged by a court out of possession against property in the exclusive and lawful custody of a court of another jurisdiction, and no final

> judgment can be entered by such a court that would authorize the levy of an execution upon it, because it is already in custodia legis. The only remedy that can be afforded by a court to enforce an assessment under the conditions set up in said section 66 is to allow the claim and provide that it be satisfied out of the property in the hands of the administrator. This is clearly pointed out by Judge Shiras in Wickham v. Hull, 60 Fed. 327."

It follows now that if petitioner's mother took the distributed assets clear of lien, the assets, if they ever became subject to lien, must have become so in her possession or in the possession of her grantee. It will be remembered that petitioner's mother deeded to petitioner a part of the real assets about a month after distribution, the bank stock remaining in the mother's possession.

Section 102 9 28 Revised Statutes Utah 1933 (then in effect as Section 7673 of the Compiled Laws of Utah 1917) provides:

> "When the accounts of the administrator or executor have been settled, and an order made for the payment of the debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees to contribute to the payment of his claim * * *."

If this section be given full effect it would require a holding that the receiver whose 1932 claim was not included in the probate order for payment in 1920, has no right after the distribution to call upon heirs, devisees or legatees to contribute to the payment of his claim. Certainly it would appear he is without right to call upon a grantee of a distributee where the grant is twelve years old.

It is believed that the lien could not have attached to the assets during the month same were owned by petitioner's mother, and after her grant to petitioner, same were free of any claim of lien.

The Utah statute if given its plain effect clearly distinguishes this case from Matteson v. Dent, 176 U. S. 521, quoted from in the decision below. Matteson v. Dent turns on the effect of a Minnesota statute which provides that an estate creditor may recover from next of kin sufficient of the distributive shares to satisfy the debt. The Utah law closes the matter finally unless the creditor's claim was included in the probate order for payment of debts, and should be given effect according to its intent the same as was the Minnesota statute in the case of Matteson v. Dent.

It is believed, in any event, that no lien arose through the stock liability. In the dissenting opinion it is said:

> "No lien is given by statute, although the liability is fixed by statute. The lien is said to be equitable. In Hodges v. Meriwether, 55 F. (2) 29, 31, a like contention was made by the receiver. In response thereto the court said: 'But no lien, equitable or otherwise attached to this property while it was the property of the estate and it passed to her clear of any such lien.'" Zimmerman v. Carpenter, supra, cited to sustain a contrary conclusion in Drain v. Slough, 61 F. (2) 668, does not support that view. The statement in Mann v. Kleisdorff, 16 F. (2) 997, 998, that in event an assessment is made after the running of the local statute of limitations the receiver could pursue his remedy against funds of the decedent 'into whosoever hands they might have come' is obiter. Moreover, it does not appear that there were no funds of the estate in the hands of the executrix at the time the assessment was made, as here. There were no liens, at common law without possession by the one claiming the lien. 'Its policy was to discountenance secret liens inasmuch as they hinder trade and restrict the safe and speedy transfer of property.' It is true that the creditors of a bank, whom the receiver here represents, had an equitable lien on the capital stock of the bank,—the funds paid in or to be paid in on subscription therefor, and those to be paid on assessment; but it certainly cannot be that such a lien extends to all of the other property of each stockholder.

Pomeroy's Equity Jurisprudence, Section 1234, is in part this:

> 'The theory of equitable liens has its ultimate foundation, therefore, in contracts, express or implied, which either deal with, or in some manner relate to, specific property, such as a tract of land, particular chattels, or securities, a certain fund, and the like.'

I find no authority sustaining the proposition that creditors of the corporation have an equitable lien on property of the stockholders aside from his interest in its capital stock. That lien, as pointed out by Cook on Corporations and other text writers, may be created by statute, by charter, or possibly by by-law or contract. There being no property or funds belonging to the estate of Henry Forrest in the hands of appellee as administrator at the time liability for the assessment arose and the cause of action accrued, nor for more than eleven years prior thereto, there was no res to which the asserted lien could attach nor assets of the estate to be followed into the hands of the distributees * * *."

CONCLUSION.

Petitioner submits that the cause was tried at law and not in equity for devastavit by maladministration. In developing the action it was alleged that certain assets were mismanaged, tracing them into the hands of petitioner by grant from the estate distributee. The proof of the receiver failed on this theory utterly. The opinion below absolves petitioner of devastavit. This was the only case tried. The opinion below says that a stock liability arising about twelve years after the estate distribution was completed, claims paid, and the property deeded to petitioner by the distributee, constitutes an equitable lien against the property. It is submitted that not only is there no equitable lien arising, but such lien could not be impressed on property secured in the hands of a distributee's grantee, and undisturbed for approximately twelve years. So to

impress it is to disregard the present state of title and the claims of persons not before the court; to derogate from the plain intent of Utah statute and law, and to substitute therefor the effect of a contrary Minnesota statute; to countenance secret liens which hinder trade and restrict the safe and speedy transfer of property; and to re-write the statute which provides the bank stock liability by adding thereto lien provisions which make for uncertainty in titles to homes and kindred realty.

Petitioner therefore prays that the decree of the Tenth Circuit Court of appeals be reversed, the judgment of the District Court of the United States for Utah be affirmed with costs; and for such other and further relief as to this Honorable Court may seem meet and just.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 214.

ERNEST R. FORREST, *Petitioner*,

vs.

ARCH R. JACK, Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, *Respondent*.

BRIEF OF RESPONDENT.

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ARCH R. JACK, Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, *Respondent.*

BRIEF OF RESPONDENT.

STATEMENT OF CASE.

The statement of the case in the petition for writ of certiorari, pages 1-4, is adopted subject to the following corrections and additions (reference here being made to the page numbers of said petition):

Page 2. Although the state probate court entered an order on March 11, 1920, ordering distribution of the estate, petitioner did not file his application for discharge as administrator until November 18, 1931 (R. pp. 29-32) and the order of discharge was not filed until December 3, 1931, (R. 33) two days after the closing of the Nephi National Bank (R. 1).

Page 2. Record reference stated as (R. 20) should be (R. 19).

Page 3. Record reference (R. 33) should be (R. 32). Attention is called to the fact in this connection that the delivery of this stock to the bank was within the sixty day limitation of Sec. 64, Ch. 2, U. S. Code, Title 12, preserving liability upon the record owner.

Attention is further called to the fact that defendant at all times knew that the stock had not been transferred upon the books of the bank, notwithstanding he had delivered the stock to his mother as distributee (R. 22).

Page 3. The statements on page 3 concerning the theory of the case, that it was not tried upon equitable issues, and that there was a defect of parties, etc., are argumentative rather than allegations of fact. The theory of the case and the question of parties is discussed by respondent *infra* pages 36-38.

Page 3. The motions of plaintiff and defendant referred to on page 3 will be found in the record pages 23 and 24, and the denial of the motion of the plaintiff will be found in the record page 15.

Page 4. The record references (R. 48, 59) should be (R. 47-58).

A.

SUMMARY OF ARGUMENT.

I. The contingent assessment liability of Henry Forrest upon six shares of stock in the Nephi National Bank survived his death and became a liability of his estate. The stock was never transferred upon the books of the bank and stood in the name of the testator, Henry Forrest, at the time this suit was instituted. Consequently, the estate continued liable, and the contingent liability ripened into absolute liability when the assessment was levied on March 8, 1932, notwithstanding the state probate court had entered an order on March 11, 1920, authorizing, and the defendant as administrator had made, distribution of the entire assets of the estate, including the six shares of stock in question. The receiver was entitled to enforce collection of the assessment from the assets of the estate and could properly pursue such assets into the hands of the defendant, Ernest R. Forrest, as a grantee with notice from his mother, the distributee of the assets of the estate.

(A) THE CASE OF MATTESON V. DENT, 176 U. S. 521, RELIED UPON BY THE COURT BELOW, ESTABLISHED THE FEDERAL RULES THAT:

(1) The contingent assessment liability of a shareholder of a national bank constitutes a debt or obligation within the meaning of the assessment statutes and survives against and becomes a charge or lien upon, his estate;

(2) Such liability and lien continue against the estate so long as the stock is not transferred upon the books of the bank from the name of the deceased stockholder;

(3) The fact that assessment had not been levied at the time of distribution of assets of an estate (termed "allotments" in the case) does not prevent the contingent liability for assessment from constituting a debt or obligation of the estate, and a lien thereon, within the meaning and effect of the assessment statutes at the time of such distribution or allotment;

(4) The liability of the estate for the assessment being established under the foregoing rules, the receiver can enforce such liability against the allottees or distributees under a state law making them liable for the debts of the estate to the extent of the assets received by them from the estate.

(B) THE LAWS OF UTAH MAKE THE DEBTS AND OBLIGATIONS OF A DECEDENT A CHARGE OR LIEN UPON THE ASSETS OF HIS ESTATE, AND IN CONSEQUENCE PERMIT THE CREDITOR TO PURSUE THE ASSETS INTO THE HANDS OF THE HEIRS AND DISTRIBUTEES. HENCE, THE COURT BELOW WAS NOT IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF HENRY FORREST TRACEABLE TO THE DEFENDANT, AS A GRANTEE WITH NOTICE FROM A DISTRIBUTEE OF THE ESTATE, WERE IMPRESSED WITH A LIEN BASED UPON THE ASSESSMENT LIABILITY.

(c) The Federal statutes create the assessment liability and make the same a charge or lien upon the assets of the estate of a decedent. Hence, regardless of state laws, such lien follows the assets into the hands of heirs and distributees and accordingly the court below was not in error in holding that the assets of the estate of Henry Forrest traceable to the defendant as a grantee with notice from a distributee of the estate were impressed with a lien based upon the assessment liability.

II. The "non-claim" statutes of Utah are no bar to the assertion of the assessment liability against the estate, and hence do not preclude the pursuit of said assets into the hands of the defendant under the doctrines established in Matteson v. Dent, supra, for the reasons that:

(a) Contingent claims, such as the assessment claim in question, are not within the purpose of the "non-claim" statutes of Utah.

(b) The assessment liability is created by Federal statute, is made a lien upon the estate by Federal statute, and, assuming, for discussion only, that the assessment claim is literally within the scope of the state "non-claim" statutes, the state statutes cannot prevail over the operative effect of the Federal statutes where relief is being sought in the Federal court.

III. The Court below committed no error in holding (a) that the trial court should have granted the plaintiff's motion to transfer the cause to the equity side to impress a lien for the assessment liability upon the assets acquired by the defendant from the estate, and (b) that notwithstanding the failure of the trial court to transfer the cause to the equity side, the court below had the power to make the transfer and consider the case as in equity and dispose of it on the record as presented upon reaching the conclu-

sion that it had been fully heard in the trial court and that there was no occasion for a retrial.

IV. The defendant may also be held liable to the receiver on the theory of devastavit, for the reason that, having permitted the estate to remain liable for the assessment by not causing the stock to be transferred upon the books of the bank to his mother, the legatee, or to some other competent person, and such liability still being in existence at the time he made the distribution of the assets of the estate as administrator, he thereupon became guilty of illegal dissipation of assets in that he did not take appropriate means either to provide for the outstanding contingent assessment liability or to eliminate and remove such assessment liability from the estate by a proper transfer of the stock upon the books of the bank from the name of the decedent.

B.

ARGUMENT.

I. The contingent assessment liability of Henry Forrest upon six shares of stock in the Nephi National Bank survived his death and became a liability and a charge, or lien upon, his estate. The stock was never transferred upon the books of the bank and stood in the name of the testator, Henry Forrest, at the time this suit was instituted. Consequently, the estate continued liable, and the contingent liability ripened into absolute liability when the assessment was levied on March 8, 1932, notwithstanding the state probate court had entered an order on March 11, 1920, authorizing, and the defendant as administrator had made, distribution of the entire assets of the estate, including the six shares of the stock in question. The receiver was entitled to enforce collection of the assessment from the assets of the estate and could properly pursue such assets into the hands of the defendant, Ernest R. Forrest, as a grantee with notice from his mother, the distributee of the assets of the estate.

(A) Discussion of the case of Matteson v. Dent, 176 U. S. 521, relied upon by the court below.

The court below based its decision as to the merits primarily upon the principles established by the case of Matteson v. Dent, *supra*. The analogy between the Matteson v. Dent case and the instant case is very close and is squarely in point upon the basic issues involved. In that case it appears that Matteson, who was the owner of ten shares of stock in a national bank duly registered upon the books of the bank in his name, died intestate in July, 1895, leaving surviving his widow and six children. The probate court of Minnesota appointed an administrator, who filed an inventory, in which was embraced the shares of stock in question. In September, 1896, a final decree of distribution of the assets, including the ten shares of stock, was entered. Under such decree the widow and the heirs acquired said assets and took the ten shares of stock in common ownership, in indivision, in proportion to their interests in the estate. In November, 1896, the bank became insolvent and a receiver for the same was appointed by the Comptroller of the Currency. In January, 1897, the Comptroller made an assessment upon the shareholders of the bank under the Federal statute. No transfer of the stock upon the books of the bank had been made, and the receiver having given due notice of the assessment sued in the state court to recover from the widow and children of Matteson, as next of kin, the amount of the assessment, the suit being brought under the Minnesota statutes permitting an action by a creditor of the estate of a deceased person against the next of kin to recover the distributed assets received from the estate, or so much thereof as might be necessary to satisfy a debt of the estate. Service was had only upon the widow and one of the children. A demurrer to the complaint was filed, overruled, and, upon appeal the order overruling the demurrer was sustained by the Supreme Court of the state. 70 Minn. 519; 73 N. W. 416. Thereafter the demurring defendants answered upon the merits, denying liability, and a

motion for judgment upon the pleadings was thereupon made and granted, and judgment was entered in favor of the receiver, against the defendants, and each of them, in the sum of $1,000 with interest. The judgment was affirmed on appeal by the Supreme Court of the state (75 N. W. 1041) and a writ of error was thereafter allowed, thus presenting the case to the Supreme Court of the United States for review. This court affirmed the judgment, and established, inter alia, the four principles following:

(1) *The contingent assessment liability of a shareholder of a national bank is a debt or obligation within the meaning of the assessment statutes, and survives against and becomes a charge or lien upon his estate.*

In support of the foregoing, this court said:

> "Because the insolvency of the bank took place *after the death* of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts, only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders to contribute to pay debts ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. *But the obligation to respond is engendered by and relates to the contract from which it arises.* This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder." (Pages 524-525; italics inserted.)
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> "The question was settled in *Richmond v. Irons,* 121 U. S. 27, where the court said (pp. 55, 56):

" 'Under the national banking act the individual liability of the stockholders is an essential element of the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. *Flash v. Conn.*, 109 U. S. 371; *Hobart v. Johnson*, 19 Blatchford, 359. In Massachusetts it was held, in *Grew v. Breed*, 10 Metc. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity.' " (pp. 526-527.) (Italics inserted)

(2) *Such liability and lien continue against the estate so long as the stock is not transferred upon the books of the bank from the name of the deceased stockholder.*

In support of the foregoing the court quoted with approval from the case of Davis v. Weed, 7 Fed. Cas. 186, as follows:

" 'The original liability of the intestate to pay the assessments which may be ordered by the Comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the lia-

bility has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud.' " (p. 526.) (Italics inserted)

The court also quoted with approval, from the case of Bailey v. Holister, 26 N. Y. 112, as follows:

" 'It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds not from any new contract made by or on behalf of the estate, but it is inherent in the property itself. To avoid it the estate must part from the property; must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives, as it bound him, as long as the relation of stockholder existed.' " (pp. 527-528.)

In further discussing the question this court also said:

"But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association—that is; the one in whose name stock stands on the books of the association—remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied

by a transfer on the books of registry of the association, such registered owner remains liable. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 328; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; and *Richmond v. Irons*, 121 U. S. 27, 58. This principle thus settled as to the stockholders in national banks is in entire accord with the rule established by state courts in construing statutes containing substantially similar provisions." (p. 530)

(3) *The fact that assessment had not been levied at the time of distribution of assets of an estate (termed "allotments" in the case) does not prevent the contingent liability for assessment from constituting a debt or obligation of the estate, and a lien thereon within the meaning of the assessment statutes at the time of such distribution or allotment.*

In support of the foregoing this court said:

"It is argued, however, that as by law of Minnesota the liability to be called upon to pay a debt of the estate, to the extent of the distributive share received, depended solely upon whether there was such debt existing at the time the allotment was made, and as there was no such debt in the present instance, no duty to respond arose. This is predicated upon the assumption that because the insolvency happened after the allotment, therefore there was no debt at the time of the allotment. This assumes that whether there was a debt depended upon the date of the insolvency. In effect, this is but to argue that the estate was never liable at all. Such clearly is the essence of the proposition, for if it be that whether there was a debt is to be alone ascertained by the happening of insolvency and not by referring to the date of the subscription, then where insolvency occurred after the death of the stockholder, there would be no responsibility. The unsoundness of this view has been already demonstrated." (p. 529) * * *

"The contention is next made that conceding there was a debt of the estate, and granting that the statute embraced a preexisting contract obligation which had

not ripened into an actual demand because insolvency had not taken place, nevertheless the court below erred, because by the effect of the allotment the estate had ceased to exist and all its property had passed to the allottees. This but reiterates the misconception already disposed of." (p. 529)

(4) *The liability of the estate for the assessment being established under the foregoing rules, the Receiver can enforce such liability against the allottees or distributees under a state law making them liable for the debts of the estate to the extent of the assets received by them from the estate.*

In support of the foregoing this court said:

"It is clear that, by necessary implication, it was decided that by the statutes of Minnesota under which the allotment in indivision was made, the heirs or next of kin remained by operation of law, *to the extent to which they received the property of the estate,* subject to be sued and to respond to the debts of the estate existing at the time the allotment took place." (p. 528) (Italics inserted)

* * * * * * * * *

"Whether the effect of the allotment was to extinguish the estate, was wholly dependent on the Minnesota law. That law, as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract, and liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question." (pp. 529, 530)

* * * * * * * * *

"As in the case now before us the stock remained on the books in the name of Matteson, continued as a liability of the estate and was never transferred under the allotment, it follows that the allottees have no right to complain because the receiver has availed himself of the provisions of the Minnesota statute." (p. 532)

Applying the foregoing principles to the instant case, it appears that the contingent assessment liability of Henry Forrest upon the six shares of stock survived his death and became a liability of, and a charge or lien upon, his estate; that inasmuch as said stock was permitted to stand upon the books of the bank in his name and so stood at the time the assessment was levied and the suit was filed, the estate of Henry Forrest continued to be responsible for the assessment and charged with a lien for its payment; that said liability and lien were not affected by the fact that the assessment had not been levied at the time of distribution of the assets in 1920. Hence considered (for the purpose of argument only), from the standpoint of the *state* law in conjunction with the *Federal* law, it follows that if the laws of Utah permit a creditor to pursue assets of the estate of a decedent into the hands of heirs and distributees and their grantees with notice, the court below, in line with Matteson v. Dent, was not in error in holding that the assets of the estate of Henry Forrest traceable to the defendant as such grantee with notice, were impressed with a lien based upon the assessment liability.

The discussion next following (under sub-paragraph (b) of this division, pp. 12 to 22) will discuss the Utah law in this connection. However, it is *also* the position of respondent, as will more fully hereinafter appear (sub-paragraph (c) of this division of the argument, p. 24 *infra*, and sub-paragraph II (b), *infra*, pp. 30 to 34), that the lien for the assessment liability having been created by Federal law, follows the assets to the heirs and distributees and grantees with notice *and may be enforced regardless of the provisions of state laws.*

(B) THE LAWS OF UTAH MAKE THE DEBTS AND OBLIGATIONS OF A DECEDENT A CHARGE OR LIEN UPON THE ASSETS OF HIS ESTATE, AND IN CONSEQUENCE PERMIT THE CREDITOR TO PURSUE THE ASSETS INTO THE HANDS OF THE HEIRS AND DISTRIBUTEES. HENCE, THE COURT BELOW WAS NOT IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF HENRY FORREST TRACEABLE TO

THE DEFENDENT, AS A GRANTEE WITH NOTICE FROM A DISTRIBUTEE OF THE ESTATE, WERE IMPRESSED WITH A LIEN BASED UPON THE ASSESSMENT LIABILITY.

(1) *The Applicable Statutes of Utah making the Assets of the Estate of a Decedent liable or Chargeable for his Debts and Obligations.*

"Every person over the age of eighteen years of sound mind may by last will dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chapter 4 of this title, being *chargeable in both cases* with the payment of all the decedent's debts as provided by law."
—R. S. U. 1933, Sec. 101-1-1; (C. L. 1917 Sec. 6311)

"When a person dies intestate, *all his property, real and personal,* without any distinction between them, *is chargeable* with the payment of his *debts,* except as otherwise provided by law."
—R. S. U. 1933, Sec. 101-3-2; (C. L. 1917 Sec. 6383)

"When any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this title or in the probate code, *subject to the payment of his debts,* in the following manner:" * * *
—R. S. U. 1933, 101-4-5 (L. 25, p. 195, C. L. U. 1917, 408)

"The property of a testator, except as otherwise provided by law, must be resorted to for the payment of debts, expenses and family a owance in the following order:

(1) The property which is expressly appropriated by the will for the payment of the same.
(2) Property not disposed of by the will.
(3) Property which is devised or bequeathed to a residuary legatee.
(4) Property which is not specifically devised or bequeathed.
(5) *All other property ratably.*

Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for."

—R. S. U. 1933, 101-3-3 (C. L. 1917, 6384)

"If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court and there remain to be paid over to the party when he becomes entitled thereto, or if he fails to establish his claim, to be paid over or distributed as the circumstances of the case require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered."

—R. S. U. 1933, 102-9-26 (C. L. 1917, 7671)

It is obvious from the foregoing that the Statutes of Utah specifically provide that the assets of the estate of a decedent, whether disposed of by a will or under the distribution laws of the state, are chargeable with the payment of all of its debts. Being chargeable with such payment, it necessarily follows that the debts constitute a lien upon such assets. As will be more fully hereinafter indicated, these statutes are no more than a reiteration of the ancient rules of law prevailing even in the absence of statute under which the courts have always held that the assets of a decedent's estate are charged with liability for payment of his debts. In addition to this there is further the Federal statutory provision embodied in Section 5152 U. S. R. S. (U. S. Code, Title 12, Ch. 2, Sec. 66) that the assets of the estate of a decedent are chargeable with payment of assessment liability to the same extent as though the stockholder were living.

There are no Utah statutory provisions affirmatively providing for the pursuit by a creditor of the assets of a dece-

dent's estate into the hands of his heirs or distributees or legatees but there are statutes which provide for the adoption or acceptance of the common law and of equity as the rule of law to govern in Utah in the absence of statutory provisions upon a particular subject.

Section 5838 of the Compiled laws of Utah of 1917 provides:

> "The common law of England, so far as it is not repugnant to, or in conflict with the Constitution and laws of the United States, or the Constitution and laws of *this state, shall be the rule of decision in all the* courts of this state."
>
> (Carried forward to substantially the same effect in the Revised Statutes of Utah 1933, Sec. 88-2-1.)

Section 5839 Compiled Laws of Utah, 1917, provides:

> "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the revised statutes. The revised statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. *Whenever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail.*"
>
> (Carried forward substantially as Sec. 88-2-2 of the Revised Statutes of Utah, 1933.)

Article VIII, Sec. 19, of the State Constitution, provides:

> "There shall be but one form of civil action, and law and equity may be administered in the same action."

Assuming for present discussion that there are no Utah state statutes upon the question of pursuing assets into the hands of heirs or distributees, it follows in consequence of the foregoing that the ancient or established rules of law and equity which prevail in the absence of statute are de-

terminative in the State of Utah upon that subject, and that if such established non-statutory rules permit the pursuit of assets of the estate of a decedent into the hands of heirs or distributees or grantees with notice from such distributees or heirs, recovery of the amount of the assessment from the defendant herein is proper on the basis that he has received assets of the estate greater in value than the amount of the assessment and hence that he is properly accountable for the amount of the assessment.

(2) *The Established Non-statutory Rules of Law and Equity do Permit the Pursuit by a Creditor of the assets of the Estate of a Decedent into the hands of Heirs and Distributees and Grantees with Notice from such Heirs and Distributees for the Purpose of Satisfying the Claim of such Creditor.*

In support of the foregoing doctrine the following cases may be noted:

Borer v. Chapman, 119 U. S. 587, 599, 600.

This was a bill in equity filed by a creditor to reach assets of the estate of a decedent, after distribution to devisees and legatees had been made and the estate had been closed. It appeared that probate proceedings were had in Minnesota, and that inasmuch as the bulk of the property was located in California, ancillary proceedings were filed in California. In due time, after publication of notice to creditors in California, final distribution of the assets was made to the legatees. Suit was then filed in Minnesota to collect the proceeds of this distribution from the legatees, and their successors in interest, and to apply the same toward the payment of a judgment held by the plaintiff against the decedent. This court held that the assets could be followed into the hands of the distributees and their successors in interest and in that connection said:

"Such assets were impressed with a trust which such creditor had a right to have administered for his benefit. Aspden v. Nixon, 4 How. 467; Stacy v. Thrasher, 6 How. 44; Hill v. Tucker, 13 How. 458; Mackey v. Coxe, 18 How. 100. *It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payments of his debts.* As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States. Suydam v. Broadnax, 14 Pet. 67; Hagan v. Walker, 14 How. 28; Union Bank v. Jolly, 18 How. 504; Hyde v. Stone, 20 How. 170; Green v. Creighton, 23 How. 90; Payne v. Hook, 7 Wall. 425, 430.

"In Payne v. Hook, ubi supra, the rule was declared in these words: 'We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.'"

(Pgs. 599-600—Italics inserted.)

Board of Public Works v. Columbia College, 17 Wall. 521, 530:

This was a suit in equity by a creditor against heirs and legatees to reach property of the estate of a decedent, where the estate had been closed and part of the assets distributed to legatees, and part taken over by heirs, and to subject such assets to the payment of the debts of the plaintiff. It appeared that there were probate proceedings in which plaintiff might have filed his claim, but he negligently failed to do so. This court outlined the jurisdiction of equity to follow the assets of the estate of a decedent, even when the assets had been distributed and the estate had been closed, where timely application for relief was made by the creditor. The court denied relief in the case because it considered the creditor had been guilty of laches, but in stating the inherent jurisdiction of equity to pursue the assets of the estate, the court said:

> "The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, *even when there is no specific lien on the property,* is undoubted. It is a very ancient jurisdiction, but for its exercise the debt must be clear and undisputed and there must exist some special circumstances requiring the interposition of the court to obtain possession of and apply the property. *Unless the suit relate to the estate of a deceased person,* the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. In all cases, we believe property pledged or conveyed for the payment of the debt must be first applied.
>
> "The rule requiring the existence of special circumstances bringing the case under some recognized head of equity jurisdiction, should not only be insisted upon with rigor whenever the property sought to be reached constitutes, as here, *assets of a deceased debtor, which have already been subjected to administration and distribution;* but some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the represen-

> tative of the estate, before distribution." (Pgs. 530, 531—Italics inserted.)

To the same effect see Continental National Bank v. Hielman, 81 Fed. 36, 42, 43, 44 (assets distributed and estate closed); Pyatt v. Waldo, et al., 85 Fed. 399, 400; Chewett v. Moran, 17 Fed. 820, 821, 822 (assets distributed and estate closed); Johnson v. Colbertson, 79 Fed. 5, 6 (assets distributed and estate closed); O'Neill v. Lauderdale, 195 Pac. 121, 124 (assets distributed and estate closed); Chitty v. Gillett, 148 Pac. 1048, 46 Okla. 724 (assets distributed and estate closed); Madison v. Buhl, 8 Pac. (2) 271, 272 (assets distributed and estate closed). Mortimer et al. vs. Potter, 72 N. E. 817, 818; 213 Ill. 178. Also see cases cited 18 C. J., par. 308, pg. 954, note 11.

(3) *Utah Decisions with Reference to Following Assets.*

There appears to be only one decided case in the State of Utah upon the foregoing question,—Bacon v. Thornton, 16 Utah 138, 144, 51 Pac. 153, 154. In that case the heirs of decedent had sued defendant for an accounting for certain minerals taken from a mine of the ancestor. Defendant filed counterclaim for the value of certain improvements to the property and to charge the heirs with liability for the amount of said improvements. The trial court entered personal judgment against the heirs for the amount of the improvements and the appellate court reversed the same and held that the heirs were liable, in principle, only to the extent of the assets of the estate received by them, and in that connection the Supreme Court of Utah said:

> "It is also insisted for the appellants that the court erred in rendering a personal judgment against the plaintiffs, and we are of the opinion that this point is well taken. That the administrator is not personally liable, under any circumstances indicated by the record, is too clear for argument; and there is no evidence to show that the heirs of the deceased received any assets from the estate, *except the interest in the mine*

> *in question. The heirs are not bound to pay the debts or discharge the obligations of the ancestor unless they have received property from his estate.* If they have received assets from the estate, then they are responsible *to the extent of their inheritance,* but beyond that they are liable neither in law nor in equity. If, then, a party seeks satisfaction for debts or obligations of the ancestor from the heirs, the burden is upon him to show that they inherited assets from the ancestor's estate. Cutright v. Stanford, 81 Ill. 240; Byrd v. Belding, 18 Ark., 118; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638; Forman v. Stickney, 77 Ill. 575; Walker v. Deaver, 79 Mo. 664."
>
> (Pg. 154, Pacific Reporter—Italics inserted.)

The cases cited by the court (appearing in the above quotation) have been examined, and brief comment will be made concerning them: *Cutright et al. v. Stanford, et al.*, 81 Ill. 240, 244.

Here it was held, as to the liability of heirs of the creditor, based upon the general or non-statutory rule, that

> "The extent of their liability, both at law and in equity, is to the full amount which came to them by descent."

Forman v. Stickney, 77 Ill. 575, 578 (to the same effect).

Byrd's Administrator v. Belding's Heirs, 18 Ark. 118, 120 (to the same effect).

Schmidtke v. Miller, 71 Tex. 103, 107 (to the same effect).

Walker v. Deaver, 79 Mo. 664, 673, 679 (cited above) was a suit by a grantee against the heirs of a grantor of certain property for damages for breach of covenant of title. The estate of the grantor had been closed long prior to the filing of the suit. The liability sought to be enforced against the heirs was necessarily contingent originally, but became absolute by breach of the covenant. The court held that each of the heirs was liable in dam-

ages to the extent of his pro rata share of assets derived from the estate of the ancestor and in that connection said:

> (Pg. 673) "But in the case at bar, the estate for many years had been finally administered, and the assets all distributed. The cause of action did not accrue until long after administration was closed and distribution made. There is no pretence of the existence of any other creditor or liability. The only funds to be reached are assets received by the heirs. Under such circumstances and for such isolated object, why open the administration to go through the formulary of an allowance against the estate, not in the hands of the administrator, but in that of these defendants? Why have the administrator go after the heirs, and the plaintiffs after the administrator, with the accumulated costs and the inevitable delay? As satisfaction is ultimately to come from the heirs, why should they demand the circumlocution and burden of another administration? In a case situated like this the direful results, confusions and inequalities, suggested by the learned counsel for defendant, in permitting the plaintiffs to proceed directly against the heirs, are entirely fanciful. The maxim, *cessante causa, cessat effectus*, becomes, in such a case, a principle both of common sense and justice. State Savings Asso'n v. Kellogg, 52 Mo. 583."
>
> (Pg. 679) "VIII. Objection is taken to the judgment entered in this case, because it is against the distributee defendants in solido. This suit is against the defendants as the heirs and distributees of the covenantor. As such they are liable only to the extent of the assets received from the estate, respectively. Each heir is where, as in this case, there are several distributees, recovery can be had against each for his pro rata share of the assets received and no more."

It will be observed that in all of the foregoing cases cited by the Utah court in support of the point now in question, the heirs or distributees or legatees were held liable to the creditor of the estate of the decedent in reliance upon the general or non-statutory doctrines of law and equity that

the assets of the estate of a decedent are charged with liability for the payment of his debts and that the same may be followed into the hands of the heirs, distributees, etc., and that they are responsible by way of a judgment to the extent of the assets received by them from the estate. This would seem to demonstrate clearly that the Utah court, in citing the foregoing cases to support its conclusion, recognized that the general rule above referred to in Borer v. Chapman, *supra*, Board of Public Works v. Columbia College, *supra*, and the other cases above cited, constituted the law in Utah. Such being the case it would seem clear, following Matteson v. Dent, establishing the basis of liability, and following the Utah law permitting pursuit of the assets of the estate of a decedent into the hands of heirs or distributees, the defendant in the present case, being a grantee with notice from a distributee or legatee of the estate of Henry Forrest, took the property charged with a lien for the stock assessment, and should be held accountable in the form of a personal judgment for the amount of the stock assessment in view of the fact that he received assets greater in value than the amount of such assessment.

(4) *The Defendant, as a Grantee with Notice, Acquired no Greater Title than his Grantor.*

The defendant had actual knowledge of the fact that he, as administrator, had not performed his duty of having the stock transferred upon the books of the bank to a competent holder, and consequently he is charged with constructive notice, at least, of the further fact that under the law the estate remained responsible for the contingent or inchoate liability for assessment. Consequently, regardless of whether he actually did pay consideration for the property so received, he is clearly not in the position of a bona fide purchaser for value *without notice*, and it would seem to require no citation of authorities to support the

conclusion that he took no greater title than his grantor possessed and hence took it charged with liability and a consequent lien for the assessment.

The suggestion of petitioner (page 4 of petition and page 9 of supplemental brief) that to impress a lien upon the property is to countenance "secret liens" has no application to the instant case, inasmuch as petitioner acquired title with notice. Incidentally, it may be doubted whether there may be a bona fide purchaser for value without notice of property of an estate of a decedent where the record shows, or investigation from the record will show, outstanding liabilities of the estate not satisfied, released nor eliminated. It may also be noted that the deeds to the property in question contained the recital that the grantee received said property as the heir of the testator (R. p. 37), and while this does, literally, involve an anomalous use of terms, it apparently was intended to indicate that the defendant as grantee was in reality receiving property which, under the terms of the will, would ultimately have come to him as remainderman after the death of his mother. In fact the whole transaction in this connection seems reasonably susceptible of the fair inference that the conveyance was intended to anticipate and accelerate, by agreement of the parties, the acquisition by the defendant of the property which ultimately would have been received by him as remainderman. Of course, as remainderman, he would have been chargeable or accountable for the property to the extent required to meet the assessment liability.

(5) *Application of the Foregoing Principle of Estate Liability, to Stock Assessment Obligation.*

Assuming that it has been satisfactorily developed from the preceding discussion that under the Utah law the assets of an estate may be followed into the hands of a distributee or heir or a grantee therefrom with notice, and the case of Matteson v. Dent having established that this principle

may be applied to national bank stock assessment liability, no further citations would appear to be necessary in that connection. An examination of the subsequent history of Matteson v. Dent through the citators and otherwise does not indicate that the case has been overruled or differentiated (except in the dissenting opinion of the court below) in any of the subsequent decisions in which it has been cited. Attention may be directed, by way of cumulative authority, to the following assessment cases: Luce v. Thompson, 36 Fed. (2) 183, 185, 186; Zimmerman v. Carpenter, 84 Fed. 747 (see discussion of this case, *infra*, pg. 33); Mann vs. Kleisdorff, 16 F. (2) 997; Rankin v. Miller, 207 Fed. 602; Gilbertson v. McCarthy, 32 F. (2) 665; Rankin v. City of Big Rapids, 133 Fed. 670; Rankin v. Herrod, 140 Fed. 661. Also see the following State cases: Gift v. Love, 144 So. 562, 567 (where the estate had been fully administered and closed); Carlisle v. Love, 155 So. 197, 203 (where the estate had been fully administered and closed); Mortimer et al. v. Potter, 72 N. E. 817, 818; 213 Ill. 178.

(c) THE FEDERAL STATUTES CREATE THE ASSESSMENT LIABILITY AND MAKE THE SAME A CHARGE OR LIEN UPON THE ASSETS OF THE ESTATE OF A DECEDENT. HENCE, REGARDLESS OF STATE LAWS, SUCH LIEN FOLLOWS THE ASSETS INTO THE HANDS OF HEIRS AND DISTRIBUTEES AND ACCORDINGLY THE COURT BELOW WAS NOT IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF HENRY FORREST TRACEABLE TO THE DEFENDANT AS A GRANTEE WITH NOTICE FROM A DISTRIBUTEE OF THE ESTATE WERE IMPRESSED WITH A LIEN BASED UPON THE ASSESSMENT LIABILITY.

Discussion under this topic will be found as part of subparagraph II (b), *infra*, pp. 30 to 34.

II. The "non-claim" statutes of Utah are no bar to the assertion of the assessment liability against the estate, and hence do not preclude the pursuit of said assets into the hands of the defendant under the doctrines established in Matteson v. Dent, supra, for the reasons that:

(A) CONTINGENT CLAIMS, SUCH AS THE ASSESSMENT CLAIM IN QUESTION, ARE NOT WITHIN THE PURPOSE OF THE "NON-CLAIM" STATUTES OF UTAH AND HENCE ARE NOT EXCLUDED FROM ASSERTION AGAINST THE ESTATE.

Utah non-claim statutes:

Revised Statutes of Utah 1933 (C. L. U. 1917, Sec. 7648). Sec. 102-9-4:

> "All claims arising upon contract, whether the same are due, not due, or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever; provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; provided further, that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided."

Revised Statutes of Utah 1933 (C. L. U. 1917, Sec. 7673), Sec. 102-9-28:

> "When the accounts of the administrator or executor have been settled and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give due notice to the creditors, any such creditor may recover on the bond of the executor or administrator."

The second of the statutes above quoted (sec. 102-9-28) was obviously intended to be complementary of the first (Sec. 102-9-4). The first provides that claims of the type therein specified not presented as required shall be "barred forever" and it necessarily follows that if such claims are

forever barred they cannot thereafter be asserted either against the estate or against the creditors, heirs, devisees or legatees, and hence the second statute is merely a reiteration of what the law would be in the absence of its enactment. It further follows that if it be determined that the first statute is inoperative against the assessment liability now in question, the second statute is not operative to preclude recourse to the heirs, devisees or legatees or their grantees with notice.

It seems clear on principle that contingent claims, such as the assessment liability in question, claims growing out of covenants, warranties, guaranty contracts, and similar claims reaching into the future, wherein the liability is not only contingent but also is, from its very nature, incapable of being presented and allowed in the probate proceedings due to the fact that the liability has not become absolute and may never culminate into absolute liability, cannot reasonably be considered to be within the scope and purpose of such statutes. The courts have uniformly so held and some of the cases to that effect will here be noted.

Hantzch v. Masselt, 63 N. W. 1069, 1070, 1071, 1072, 61 Minn. 361—.

In this case the plaintiff obtained judgment against his guardian on March 3, 1894, for funds due him for which proper accounting had not been rendered. The two sureties of the guardian had died, and after due publication their estates had been finally distributed prior to the rendition of the above mentioned judgment against the guardian. The plaintiff sought to follow the assets of the estates of the sureties and recover from the legatees and distributees to the extent of the assets received from the estates insofar as necessary to satisfy the foregoing judgment. The legatees and distributees contended that the claim of the plaintiff was barred, and the assets could not be followed into their hands, because the claim had not been presented as required by the Minnesota statute. The limitation provisions of the statute are almost identical with Sec. 102-9-4 of

the Utah statute above quoted. The Minnesota court held that the contingent claim, not being capable of proof in the probate proceedings, was not intended to be within the scope of the limitations statute and hence the plaintiff could pursue the assets into the hands of the legatees and distributees. In that connection the court said:

> "The plaintiff's claim did not become absolute and liquidated until long after the time for presenting claims against the estates of the deceased sureties, or either of them, had expired, and the estates settled and distributed to the defendants, as heirs and devisees. Is this action then barred because the plaintiff did not present the claim to the probate court for allowance?
>
> "The answer involves a construction of sections 104, 107, and 110 of the Probate Code (chapter 46, Laws 1889; sections 4511, 4514, 4517, Gen. St. 1894), which read as follows:
>
> " 'Sec. 104. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought by the executor or administrator. All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim.'
>
> " 'Sec. 107. No action at law for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court except as provided in this Code. No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five (5) years after

the death of such decedent: provided, that this provision shall not be construed as affecting any lien existing at the date of such death; *provided further, that said provision shall not be construed as affecting the right of a creditor to recover from the next kin, legatee or devisee to the extent of assets received.* * * *,'"
(pp. 1070, 1071, Reporter Citation—Italics inserted.)

* * * * * * * * *

"If section 104 is construed literally, it would include, not only the plaintiff's claim, but all claims of every kind arising upon contract. Its language is 'all' claims arising upon contracts, whether the same be due, not due, or contingent. These three classes include all possible claims growing out of contracts. If there are no implied exceptions in this statute as to any class of contingent claims, *then, if a person dies who was a stockholder in a corporation,* or had conveyed lands by a warranty deed, or signed official bonds as a surety, or given leases for a term of years, with covenants to indemnify the lessee against damages by water from the pipes on the demised premises, creditors, obligees, and covenantees who would not be forever barred of all right to any redress against his property must hasten to the probate court, and prove their claims, within the 18 months from the giving notice of the order limiting the time to press its claims against the estate. How can they be proved? Counsel for respondent answers: 'State the particulars of the claim under the provisions of section 104.' But, until a contingent claim becomes absolute, the amount thereof cannot be liquidated, so that it can be allowed by the court, and the amount thereof stated in the order allowing it, as required by section 110." (p 1071, Reporter Citation—Italics inserted.)

* * * * * * * * *

"Section 104 must be given a reasonable, and not a literal, construction, which, as we have seen, would lead to absurd and unjust results. Clearly, it was not the intention to bar claims for the payment of which no possible provision was or could be made, nor to repeal as to claims arising on contracts. Gen. St. 1878, c. 77, secs. 7-14, inclusive (Gen. St. 1894, secs. 5918-5925)."
(p. 1072, Reporter Citation.)

It is true that section 107 of the Minnesota statute contains a proviso that the restrictive or limitation provisions therein referred to "shall not be construed as affecting the right of a creditor to recover from the next of kin, legatees or devisees to the extent of the assets received." *This proviso, however, does not create a new right, but merely reiterates what would necessarily be the law in the absence of the provision.* That such provision does not create a new right is indicated by the state court decision in Dent v. Matteson, et al., 73 N. W. 416, 70 Minn. 519, wherein it was said (p. 417 of the Reporter edition): "It seems to us that Section 5152 is merely declaratory of what the courts would have held without the aid of that section * * *". The fundamental laws relating to estates, referred to in Borer v. Chapman, *supra,* Board of Public Works v. Columbia College, *supra;* and the cases of similar type hereinbefore cited, charging heirs, distributees and legatees with liability for the debts of the estate to the extent of the assets received, preclude any construction or conclusion barring the claim of a contingent creditor who has never had an opportunity under the law to present and enforce his claim. In Leavenworth Savings & Trust Co. v. Newman, 23 Fed. (2) 835, 837, the Circuit Court of Appeals for the Eighth Circuit, in discussing this subject, with reference to "non-claim" statutes, said:

> "(2) Further, in so far as recovery is sought against the heirs of J. F. Drais, who have received distributive shares of his estate, the cause of action arises by virtue of the provisions of the statutes of Missouri which make the descent of both real and personal property subject to the debts of the ancestor. Rev. St. Mo. 1919, sec. 303, 2270; Higbee v. Billick, 244 Mo. 411, 424, 148 S. W. 879; City of Springfield v. Clement, 205 Mo. App. 114, 123, 225 S. W. 120; Rogers v. Johnson, 125 Mo. 202, 216, 28 S. W. 635. Similar statutes exist in many of the states. Under these statutes it is generally held that the heirs and distributees may be proceeded against directly, where the cause of action did

not arise or accrue, so as to become provable and enforceable, until after the administration of the estate had been closed. * * *"

To the same effect see:

Luce vs. Thompson, 36 F. (2) 183, 184
Rankin v. City of Big Rapids, 133 F. 670, 680, 681.
Rankin v. Herod, 140 F. 661, 664.
Payson v. Hadduck, et al., 19 Fed. Cas. 23, 25, 26, Case No. 10862 (D. C. Ill. 1878)
Davis v. Weed, 7 Fed. Cas. 186, 187, 188, 189, 190, Case No. 3658 (C. C. Conn. 1877).
State v. Tittman, 134 Mo. 162, 35 S. W. 579, 580.
Logan v. Dimon (*Wis.*), 41 N. W. 713, 714, 715, 716.
Mann v. Everts, 64 Wis. 372; 25 N. W. 209.

(b) THE ASSESSMENT LIABILITY IS CREATED BY FEDERAL STATUTE, IS MADE A LIEN UPON THE ESTATE BY FEDERAL STATUTE, AND, ASSUMING, FOR DISCUSSION ONLY, THAT THE ASSESSMENT CLAIM IS WITHIN THE SCOPE OF THE STATE "NON-CLAIM" STATUTES, THE STATE STATUTES CANNOT PREVAIL OVER THE OPERATIVE EFFECT OF THE FEDERAL STATUTE WHERE RELIEF IS BEING SOUGHT IN THE FEDERAL COURT.

The general doctrine is thoroughly settled that the national banking laws are a system complete within itself, covering the organization, supervision, and liquidation of national banks, and that the laws of the states will not be permitted to impinge upon or interfere with the operative effect of the Federal provisions.

Cook County National Bank v. United States, 107 U. S. 445, 448;
California Bank v. Kennedy, 167 U. S. 362, 366;
Davis v. Elmira Savings Bank, 161 U. S. 275;
Easton v. Iowa, 188 U. S. 220;
Texas & Pacific Railroad v. Pottorff, 291 U. S. 245, 253;
First National Bank v. Missouri, 263 U. S. 640.

It follows from the foregoing that where, as in the instant case, the Federal law has provided incident to the liquidation of national banks, not only for assessment lia-

bility (secs. 64, 65, ch. 2, Title 12, United States Code), but in effect that such assessment liability, even though contingent or inchoate, shall constitute a lien upon the assets of the estate (sec. 66, ch. 2, Title 12, United States Code; Matteson v. Dent, *supra*), no state law can defeat the enforcement of the lien and pursuit of the assets based upon the established doctrines applicable to estates and available in the Federal courts. In this connection may be noted the following:

Borer v. Chapman, 119 U. S. 587, 600 (*referring to the jurisdiction of equity to pursue assets to satisfy debts of a decedent*):

> "As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the Circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States." (p. 600)

Continental National Bank v. Heilman, 81 Fed. 36, 44:

> "These cases settle the doctrine that the statute of a state prescribing the time within which a suit must be brought against heirs to charge them with an ancestral debt cannot be invoked for their protection in the national courts." (p. 44)

Mortimer, et al. v. Potter, 72 N. E. 817, 818; 213 Ill. 178:

In this case, Charles Kavanagh, the stockholder of a national bank, died, and the assets of his estate had been delivered to trustees under a trust created under the will and the decedent's estate had been settled more than twenty years before the assessment was levied. The stock apparently remained of record in the name of decedent and checks for dividends were made payable to Charles Kavanagh and were endorsed by the widow as co-trustee under

the trust. The receiver sued the surviving trustee, as trustee (the widow having died), and the distributees receiving the assets of the estate, and also the surviving trustee personally. The court affirmed the judgment of the lower court rendering judgment to take effect primarily against the surviving trustee, secondarily against the legatees and distributees, and ultimately against the trustee personally, for the assets of the estate to the extent necessary to meet the assessment. The defense raised the point, inter alia, that the claim was barred because not presented within two years as required by state law. In overruling this contention and holding that the state statute was ineffective against the Federal statutes, the court said (p. 818, Reporter Citation):

> "It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this, at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, *and the estate is liable under its provisions, so long as the assets can be reached.* The case of Zimmerman v. Carpenter (C. C.), 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: 'Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever

> barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3465). Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the death of the testator does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.' Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, *supra*." (Italics inserted)

The case of Zimmerman v. Carpenter, 84 Fed. 750, quoted in the foregoing extract from the opinion, contains the statement: "if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." An examination of the Carpenter case indicates that inasmuch as the assets had *not* been distributed, the foregoing observation of the court is *obiter dictum* and may be disregarded. It is clearly not sound as a matter of law, inasmuch as it is contrary to the cases holding that the assets may be followed to the hands of heirs, devisees, and distributees by virtue of the lien upon said assets for the payment of the debts of the decedent.

For additional cases to the effect that state laws cannot affect the operation of the Federal statutes in this connection, see:

> *Payne v. Hook*, 7 Wall. 425, 430.
> *Chewett v. Moran*, 17 Fed. 820.

It is obvious that if non-claim statutes of a state are to be permitted to bar the enforcement of the assessment liability against heirs, legatees, distributees and their grantees with notice, where the Federal law has expressly imposed a

lien upon the estates of decedents, and with reference to which lien and liability all purchasers of national bank stock must take notice, the purposes of the National Banking Act designed to protect the creditors of the bank in the event of insolvency will be defeated, and the ancient doctrines of equity concerning the settlement of estates and available in the Federal courts for the enforcement of the national banking laws, where appropriate, would be rendered nugatory. As indicated, such construction is entirely contrary to the decided cases. To the effect that sec. 66 does impose a lien upon the assets of the estates therein mentioned see:

Gilbertson v. McCarthy, 32 Fed. (2) 665, 667, 668; Luce v. Thompson, 36 Fed. (2) 183, 184, 185; Rankin v. Miller, 207 Fed. 602, 613, 614, 616; Miller v. Hamner, 269 Fed. 891, 894; Rankin v. City of Big Rapids, 133 Fed. 670, 680, 681; Rankin v. Herod, 140 Fed. 661; Drain v. Stough, 61 Fed. (2) 668, 669.

For cases specifically to the effect that the Federal decisions and the principles of law thereby established, must be followed in construing the national banking laws, see:

Davis v. Elmira Savings Bank, 161 U. S. 275; Easton v. Iowa, 188 U. S. 220; First National Bank v. Selden, 120 Fed. 212, 215; Farmers & Mechanic's Natl. Bank vs. Dearing, 91 U. S. 29; Prigg vs. Pennsylvania, 16 Peters 539, 617-619; First Natl. Bank of San Jose vs. California, 262 U. S. 366.

III. The Court below committed no error in holding (a) that the trial court should have granted the plaintiff's motion to transfer the cause to the equity side to impress a lien for the assessment liability upon the assets acquired by the defendant from the estate, and (b) that notwithstanding the failure of the trial court to transfer the cause to the equity side, the court below had the power to make the transfer and consider the case as in equity and dispose of it on the record as presented upon reaching the conclusion that it had been fully heard in the trial court and that there was no occasion for a retrial.

Numbered paragraph 15 of the second amended complaint of respondent (R. p. 7) alleges not only that defendant, by reason of his wrongful acts and conduct, and by reason of receiving and accepting the described property belonging to the estate of Henry Forrest without consideration, became liable to the plaintiff for the amount of the stockholders' assessment, but also that

> "the above described property so received and now held by defendant as aforesaid is, and at all times hereinafter mentioned has been, subject to a lien in favor of the plaintiff for the payment of the amount of said assessment, to wit, $600, together with interest thereon at 8 per cent per annum from 15 April 1932, until paid."

It is therefore clear that notwithstanding the fact that the case was filed on the law side of the court, plaintiff laid the foundation for equitable relief in the foregoing allegations, preceded as they were by the facts and circumstances set forth just as fully as though the complaint had been drawn with reference to the equity side. The fact that in his prayer (R. p. 7) plaintiff prayed for judgment against the defendant for the sum of $600 and interest, is not necessarily inconsistent with relief in equity, in that under the theory of plaintiff's case, and in accordance with the established right to follow assets into the hands of distributees, legatees, etc., such distributees and legatees are accountable for the proceeds of the assets and judgment may be rendered against them accordingly. Jury trial was waived by stipulation (R. pp. 15, 16) and hence in that respect the case took on the aspects of a hearing in equity. Defendant, in his answer to the aforesaid numbered paragraph 15 of the complaint denied "each and every allegation thereof" (R. p. 11) and hence put in issue the question of equitable lien, thereby again importing equitable defense into the case. Testimony was taken fully upon the issues

raised, and at the conclusion of the case the plaintiff moved for judgment at law, and in the alternative moved that

> "in case the court rules against plaintiff's contention as to the liability of the defendant in a law action, that the case be transferred to the equity side of the court, and that a decree be entered in favor of the plaintiff impressing the property described in plaintiff's second amended complaint with a lien for the payment of the stockholders' liability referred to in said complaint." (R. p. 24)

Thereupon defendant moved for judgment in his favor on the grounds that the complaint did not state facts sufficient to constitute "*any* cause of action" against the defendant, and that "the evidence in the case is insufficient to sustain any action at law *or any relief whatsoever* on behalf of the plaintiff as against the defendant, * * *". (R. p. 24.)

It is clear from the foregoing that plaintiff submitted the matter to the court not only from the standpoint of a law action, but also on the theory of relief in equity. While it is true that plaintiff might have made two motions, one for relief at law, and upon that being denied, followed it with a motion to transfer the case to the equity side and for judgment in equity, the same result was in substance accomplished by combining the two motions in one, with the equity relief being put in the alternative. The defendant in effect waived any question concerning this procedure in that by his motion he contended that the complaint did not state facts to constitute "any cause" of action (which would be broad enough to cover relief both at law and equity) and also contended that the *evidence* was insufficient not only to sustain any action at law, but "*any relief whatsoever*" on behalf of plaintiff as against defendant.

Consequently, when defendant made this motion, he must be taken to have intended it to meet and overcome plaintiff's contention for alternative relief in equity in the event

the trial court decided to treat the case as transferred to the equity side. As stated in Clifton Manufacturing Company v. United States, 3 Fed. Supp. 508:

> (Pg. 513) "It must be remembered that the remedial provisions of the statute should be liberally construed, both to prevent the unnecessary prolonging of litigation and to prevent the dismissal of causes upon too technical grounds.
>
> * * * * * * * * *
>
> (Pg. 514) "The old practice of having separate judges for the courts of law and chancellors presiding over courts of equity has long since been abandoned in most jurisdictions, and now, particularly in the District Courts, the same judge acts in both capacities. * * *"

In the light of the foregoing and of the cases and authorities next cited, it seems clear that the trial court should have transferred the case to the equity side, but that notwithstanding the failure of the trial court to do so, the appellate court (the court below) had the right to transfer the case to the equity side, and having done so, could consider it as a suit in equity and if the conclusion was reached that the case had been fully heard in the trial below, could dispose of it upon the record without sending it back for retrial. See Irons v. Smith, 62 Fed. (2) 644, 647 (and cases therein cited); Twist et al. v. Prairie Oil and Gas Co., 274 U. S. 684, 689; Liberty Oil Company v. Bank, 260 U. S. 235, 241-244; Clarksburg Trust Company v. Commercial Surety Company, 40 Fed. (2) 626, 633, 644; National Surety Co. v. County Board, 15 Fed. (2) 993, 994; Fiorito, et al. v. Clyde Equipment Co., 2 Fed. (2) 807, 808.

Petitioner says (page 3, Supplemental Bill of Complaint) that respondents' suit, insofar as it attempts to impress a lien upon the property in question, is fatally defective in that it does not appear "that all parties actually interested in such title were before the trial court". In response, it may be stated that the record shows (page 36) that title to the real estate sought to be impressed with a lien was acquired by petitioner in his personal or individual

capacity, from his mother as distributee, and stands in his own name individually and not as administrator. The record does not show anyone else having an interest in said property and petitioner does not point out anyone else having an interest therein. The fact that petitioner's sister (R. pp. 35, 36, 37) also has title to certain other parcels received from the estate, has no relevancy to the instant case, inasmuch as no attempt is now being made to subject the property held by her to the payment of the assessment. Respondent can obviously proceed against such parcels of land charged with the assessment lien as he sees fit, and in the order he sees fit. If petitioner is required to pay more than his pro rata share of the assessment from the proceeds of the property derived from the estate and held by him, he has his right of contribution from the holders of the other assets of the estate upon which the lien may also apply. See: *First National Bank v. First National Bank*, 14 F. (2) 129.

There was no occasion to join petitioner as administrator, inasmuch as (a) he is no longer administrator and has distributed the assets of the estate; (b) title to the property is in his name individually and not as administrator; and (c) he is accountable personally for the proceeds of the assets of the estate held by him individually to the extent necessary to meet the assessment; (d) such joinder involves reopening the administration proceedings. Equity demands no such circuity of action. *Luce v. Thompson*, 36 F. (2d) 183, 185.

Hence, there was no defect or non-joinder of parties.

Defendant has had his day in court, has presented his case fully, and he does not suggest in what respects he was deprived of any of his rights, either as a matter of procedure or of producing evidence to support his case. At any rate, he joined issue in the trial court upon the questions of equitable relief presented and produced evidence to meet the same, and he cannot now be heard to complain.

IV. The defendant may also be held liable to the receiver on the theory of devastavit, for the reason that, having permitted the estate to remain liable for the assessment by not causing the stock to be transferred upon the books of the bank to his mother, the legatee, or to some other competent person, and such liability still being in existence at the time he made the distribution of the assets of the estate as administrator, he thereupon became guilty of illegal dissipation of assets in that he did not take appropriate means either to provide for the outstanding contingent assessment liability or to eliminate and remove such assessment liability from the estate by a proper transfer of the stock upon the books of the bank from the name of the decedent.

Under the circumstances, it is immaterial whether the defendant be held liable on the theory found by the court below by way of impressing a lien upon the assets with a corresponding accountability by way of personal judgment for such assets to the extent necessary to satisfy the assessment, or whether defendant be held personally liable to the amount of the assessment on the theory of devastavit. The ultimate result in either event is the same, and this court may properly find an additional basis for liability of the defendant without necessarily effecting the legality of the judgment of the court below. See Aberly et al. vs. Craven Co., 70 F. (2) 52, 54.

It is of course recognized that the question of liability of the defendant on the theory of devastavit is not *necessarily* before this court for consideration, in view of the fact that the court below bottomed its decision upon the equitable lien theory and the consequent pursuit of the assets to the defendant as grantee of the distributee and expressly held that defendant was not liable for devastavit for the reason that he had made the distribution in accordance with the decree of the state probate court. Hence, it appears that this court may eliminate consideration of the devastavit theory under the doctrine of Federal Trade Commission v. Pacific States Paper Trade Association, 273

U. S. 52, 66. On the other hand, this court may, if it sees fit, review the whole case and consider the question of devastavit in accordance with Cole, et al. v. Ralph, 252 U. S. 286, 290.

For the reasons stated in the headnote, (*supra*, p. 39) we believe that defendant is guilty of devastavit and in that connection cite:

Luce v. Thompson, (C. C. A. 8, 1929) 36 Fed. (2d) 183, 186;
Gilbertson v. McCarthy, (C. C. A. 8, 1929) 32 Fed. (2d) 665, 668;
Rankin v. Miller, (D. C.) 207 Fed. 602, 613, 614, 615, 616;
Miller v. Hamner, (C. C. A. 3) 269 Fed. 891, 895.

V. Additional points raised by petitioner—Respondent's reply to same.

Petitioner has raised several other points which will be answered here so as to avoid breaking the continuity of the discussion heretofore developed:

(a) Petitioner states (page 5 of petition) that the decision of the court below is in conflict with Hodges v. Meriweather, 55 Fed. (2) 29, 31, where it was held that no lien attached to the estate of the decedent. An examination of that case indicates clearly, however, that the distributee accepted the bank's stock in question and had it transferred to her in her name on the books of the bank and thereafter transferred it to her daughter, which transfer was likewise registered on the books of the bank, a considerable period before the failure of the bank. Obviously, under such circumstances, there was no basis for holding the assets of the estate of the decedent, inasmuch as the ownership had been succeeded to in due course by a competent transferee. The court clearly points out this distinction and differentiates the case from that of Luce v. Thompson, 36 Fed. (2)

183, in which latter case as in the instant case, the estate was held liable.

(b) Petitioner also states (page 5 of petition) that the decision of the court below is in conflict with Zimmerman v. Carpenter, 84 Fed. 747. This contention has already been refuted, *supra*, page 33.

(c) Petitioner further contends (pages 5 of petition and 7 of supplemental brief) that the language there quoted from Matteson v. Dent, 176 U. S. 529, 530,—"Whether the effect of the allotment was to extinguish the estate was wholly dependent on Minnesota law,"—supports his contention that the estate of the decedent in the instant case was wholly extinguished under Utah law and that the assets could not be pursued. In response it may be stated that the previous discussion has clearly indicated (*supra*, pp. 12 to 22) that the Utah law, like the Minnesota law, permits the assets of the estate of a decedent to be pursued into the hands of the heirs and distributees. An examination of the state court decision, Dent v. Matteson, 73 N. W. 416, 417, discloses that the right thus asserted under the Minnesota Law and under Title 12 chp. 2, section 66, U. S. C., is no different or greater than would be available in the absence of statute. It has also been pointed out (*supra*, pp. 30 to 34) that, regardless of the state law, the property upon which a lien has been impressed by the Federal assessment statutes may be followed into the hands of the heirs and distributees.

(d) Petitioner contends (page 5 of supplemental brief) that no lien could attach to the assets while they were in the custody of the state probate court, and quotes in that connection from the dissenting opinion below. In response it may be stated that the previous discussion has demonstrated that the assessment liability was contingent while Henry Forrest was alive but that upon his death it sur-

vived, and immediately, by operation of law, became a lien upon his assets. The probate court necessarily thereafter took custody of the assets subject to such lien, just as it would take assets subject to an existing mortgage or subject to the lien of other debts of the estate. The suggestion in the quoted extract from the dissenting opinion that the only remedy afforded by a court to enforce an assessment under said section 66 of the United States code "is to allow the claim and provide that it be satisfied out of the property in the hands of the administrator" is clearly untenable in light of the discussion (*supra*, pp. 24 to 30) relating to non-claims statutes to the effect that such statutes do not contemplate proof of such claims and in light also of the discussion to which reference has several times been made that the state statute cannot prevent the operative effect of the lien created by Federal statute.

(e) Petitioner also contends (Petition, pp. 9 and 10) in line with the position taken in the dissenting opinion (R. p. 54) that the cases cited on page 10 of the petition in effect overrule Matteson v. Dent and hold that assessment liability is statutory and not contractual, from which it is argued that the liability does not come into existence until the assessment is levied by the comptroller, and consequently the assessment liability, under these later decisions, cannot be considered to have related back to the estate of Henry Forrest as of the time same was being administered. In answer thereto it may be noted that the cases there cited either considered the nature of the liability from the standpoint of the period within which a receiver must bring an action to enforce assessment under state statutes of limitation after the assessment is levied and the cause of action thereon has become available as a matter of court procedure to collect the assessment, or considered other aspects of the liability not pertinent to the issues here involved. We submit that it is entirely immaterial whether the assessment liability be considered wholly statutory,

wholly contractual, or a combination of both factors. Whichever view be adopted, it cannot be doubted that the liability is contingent, and as such is contemporaneous and coexistent with ownership of the stock, and is subject to ultimate enforcement and collection when the assessment is actually levied. The formal act of levy of the assessment is functional only to the extent that it matures and makes absolute the *pre-existing* unmatured and contingent liability. Hence from this standpoint, the reasoning in Matteson v. Dent to the effect that a contingent liability is a debt or obligation of the estate even though the assessment has not been levied, must still be controlling as a matter of principle. Incidentally, with reference to the cited cases above referred to, it may be noted that: *McDonald v. Thompson,* 184 U. S. 71, 74. This Court said:

> "The statute was the origin (of) both of the right and the remedy, but the contract was the origin of the *personal responsibility* of the defendant."

McClaine v. Rankin, 197 U. S. 154, 162, states that "the liability has been held to be in its nature contractual, yet it is nevertheless conditional, and enforcible only according to the Federal statutes * * *." *Christopher v. Norvell,* 201 U. S. 216, 228, states: "But that implied obligation, although *contractual in its nature,* could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all." (Italics inserted)

Attention may also be directed to the following cases:

Bernheimer v. Converse, 206 U. S. 516.

This Court, in considering a state statute similar to the Federal statute, providing for assessment liability, said:

> "It may be regarded as settled that *upon acquiring stock* the stockholder incurred an obligation arising from the constitutional provision, *contractual in its nature* and, as such, capable of being enforced * * *

although the obligation is not entirely contractual and springs primarily from the law creating the obligation." (p. 529) (Italics inserted)

Early v. Richardson, 280 U. S. 496.

In this case this Court held that certain minor children were not liable for stock assessment upon shares which had been transferred to them upon the books of the national bank by their father, for the reason that "the transferees, being minors, were without legal capacity to assume the obligation." (p. 499) This reasoning clearly took into consideration the contractual nature of the obligation. *Gift v. Love,* 144 So. 562, 567, (decided November 21, 1932, by the Supreme Court of Mississippi) held, that the assessment liability "was rooted into and was a part of his contract of subscription to the stock." To the same effect: *Carlisle v. Love,* 155 So. 197, 203 (decided June 5, 1934); *Taylor et al v. Fontaine et al.,* 10 S. W. (2nd) 68, 72 (where the nature of the liability is discussed at considerable length).

CONCLUSION.

The equities in this case are with the depositors and creditors of the insolvent national bank. They have the right, under the law, to expect that national bank stock shall at all times be held by persons who are *sui juris* and therefore legally capable of responding to a stock assessment. See: Riley v. Bondi, 64 Fed. (2) 515; Keyser v. Hitz, 133 U. S. 138; Williams v. Vreeland, 250 U. S. 295; Foster v. Chase, 75 Fed. 797; Early v. Richardson, 280 U. S. 496; Aldrich v. Bingham, 131 Fed. 363. To insure this result, the law charges the record owner with liability, and he continues liable until a proper transfer is made upon the books to a transferee legally capable of taking title, and in the event of his death his estate is made liable by the provisions of the Federal statute. If the contentions of petitioner are to prevail, neither the estate of the record owner nor the hold-

ers of the assets derived from that estate are responsible, with the result that the depositors and creditors are deprived of the security intended for their protection in dealing with the bank. We submit that such a construction cannot logically and consistently be adopted in view of the purpose of the law.

The petitioner has no equities in his favor. It was through his willful, or at least conscious, failure, during a period of approximately eleven years as administrator, to have the stock transferred from the name of a dead man to a competent transferee, that the whole situation and the resulting litigation has been made possible. He cannot complain if the assets of the estate, thus permitted to remain subject to the assessment liability and acquired by him with notice, are held to be subject to a lien for the enforcement of such liability.

Respectfully submitted,

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Attorneys for Respondent.

F. G. AWALT,
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ERNEST RUSSELL,
Of Counsel.

CORRECTED COPY

DEC 12

CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 214.

ERNEST R. FORREST, *Petitioner,*

vs.

ARCH R. JACK, Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, *Respondent.*

Supplemental List of Cases Filed on Behalf of Respondent.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supplemental List of Cases Filed on Behalf of Respondent.

By leave of Court first had and obtained the following cases are filed with reference to "non-claim" statutes, concerning the point that it is not necessary to file the claim during the period of administration. (These cases are in addition to the ones cited at the top of page 30 of the brief.)

Drain v. Stough, 61 Fed. (2) 668, 669.

Miller & Lux v. Katz, 102 Pac. 946, 947; 10 Cal. App. 576, 578.

Springhorn v. Dirks, 231 Pac. 912, 915; 72 Mont. 121, 133.

Zimmerman v. Carpenter, 84 Fed. 747, 750-751.

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Tierney v. Shakespeare, 284 Pac. 1019, 1020; 34 New Mexico, 501, 502.

Baird v. McMillan, 205 N. W. 682, 683, 684; 53 N. Dak. 258, 259; 41 A. L. R. 177, 178, 180 (notes).

Respectfully submitted,

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OCTOBER TERM, 1934.

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PETITION FOR REHEARING.

GEORGE P. BARSE,
Attorney for the Receiver of the Nephi National Bank, Nephi, Utah.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING.

Comes now Arch R. Jack, as Receiver of the Nephi National Bank of Nephi, Utah, by George P. Barse, his attorney, by direction of the Comptroller of the Currency, and presents his petition for rehearing of the above entitled cause, and in support thereof respectfully shows:

I. The decision in the instant case is based upon the premise that Section 66, U. S. Code, Title 12, Ch. 2, imposing assessment liability upon the estates of decedents, provides no "*procedure for enforcement of the liability*" and hence that recourse *must* be had to the state laws and procedure "governing claims against estates of deceased persons * * *". The claim of the receiver was disallowed

by the decision, on the theory that under the Utah state procedure concerning the administration of the estates of decedents, the assets of the estate could not be pursued to the defendant as distributee under the estate.

II. The effect of this decision is to cause enforcement of the Federal assessment right to be dependent in each case upon state law and procedure and consequently to preclude uniformity of enforcement of the Federal statute in this class of cases. The decisions in this case and in the companion case of Seabury vs. Green (No. 434) illustrate this. In each case the estate of the decedent was fully able to meet the assessment liability. In the Seabury case the assessment was held collectible from the assets; in the instant case it was held not collectible from the assets because of the effect of the state laws and procedure.

It was undoubtedly the intention of Congress that the National Banking Laws should be of uniform application, in their *substantive or fundamental* aspects, in every state of the Union, particularly with reference to the liquidation of the affairs of national banks in receivership. The principle established in the instant case, affecting as it does, the uniformity of enforcement of assessment liability as a substantive right against the estates of decedents under Section 66, is of great importance in the administration of these receiverships.

III. The oral argument and brief of the receiver presented the case *primarily* from the standpoint of the *substantive* law, and particularly with a view toward showing the application, by analogy, of the case of Matteson v. Dent, 176 U. S. 521, and that the Utah law was similar to the Minnesota law in the Dent case relating to the enforcement of liabilities against assets in the hands of heirs and distributees of the estate of a decedent.

The aspects of the matter from a procedural standpoint, and particularly as to whether Section 66 afforded a procedure for enforcement of the substantive liability against

estates thereunder created, and the consequent question of the necessity for recourse to state procedure, was not emphasized, either in the oral argument or the brief.

In view of the importance of the decision and its effect upon the administration of these receiverships, a careful recheck of the authorities has been made with special reference to the procedural aspect or basis of the decision. The cases so examined, and pertinent to the issue, are listed, under appropriate heads, in the Appendix hereto attached, for such use and reference as to the Court may seem meet and proper. We are convinced, as a result of this reconsideration of the authorities, that Section 66, together with other Federal statutes which must necessarily be read in conjunction with it, *affords full and adequate "procedure for enforcement"* of the assessment liability against the estates of decedents, and that in these types of cases recourse should not be had to the state law and procedure. A brief discussion will follow indicating our reasons in this respect.

It is earnestly requested that before the decision of the Court becomes final, an opportunity be given for a reargument of the procedural issues involved, in view of the fact that they were not primarily in mind in the presentation at the original hearing, at least not from the aspect now indicated to have been in the mind of the Court in rendering the decision; and certainly this phase of the case was not presented to the extent now indicated by the result of the recheck of the authorities to be pertinent to the issue. Our views, based upon the reexamination of the authorities, are next summarized:

(a) Section 41 (16), Ch. 2, Title 28, U. S. Code, confers jurisdiction upon the Federal courts of cases involving the winding up of the affairs of insolvent national banks. Sections 64 and 66 of Ch. 2, Title 12, provide the substantive liability of the estate of a decedent for the assessment. It therefore seems obvious that Congress intended that this

substantive liability should be enforced in accordance with the existing Federal procedure made available by said Section 41 (16). From this it necessarily follows that notwithstanding Section 66 does not *in terms* designate the enforcement procedure, *the available Federal procedure may properly be utilized, and if such available procedure is adequate, no recourse to state law and procedure is either necessary or proper.*

(b) The Seabury case, *supra*, establishes that the liability of a decedent's Estate under Section 66 was not intended to be limited to property actually in the hands of the personal representative at the time a bank becomes insolvent, or when the Comptroller's assessment is made, and that although *legal title* to said assets may have been acquired by the heirs and distributees by virtue of probate distribution, such assets may be followed into the hands of the heirs and distributees for the purpose of satisfying the assessment, where such procedure is appropriate.

(c) A suit to reach such assets, and impress a trust upon them for the debt or assessment, (Matteson vs. Dent, *supra*, holds the contingent assessment liability is a debt or obligation of the estate; also Seabury vs. Green, *supra*) is fundamentally an equitable right and remedy (Humphreys v. Walsh, 248 Fed. 414, 417, 418; McClellan vs. Carland, 187 Fed. 915, 918, 919; Borer v. Chapman, 119 U. S. 587, 599, 600; Board of Public Works v. Columbia College, 17 Wall. 521, 530;—and other cases cited in Notes 2 and 5 Appendix), and has long been recognized as being peculiarly within the ancient jurisdiction of equity, particularly where the assets of the estate had been distributed at the time of the bringing of the action. The present suit was transferred to the equity side by the Circuit Court of Appeals, and was decided by it on the basis of equity jurisdiction and procedure. *It follows that unless the state law and procedure is permitted to prevent enforcement against the heirs and distributees, recovery can be had under the Federal equity procedure.*

(d) Congress intended to preserve a sharp distinction between law and equity in the Federal courts and provided that while the Federal law courts should conform, as near as may be, to the state practice, and follow the laws of the states as rules of decision, the equity courts were expressly exempted from such requirements (Secs. 724, 725, U. S. Code, Ch. 18, Title 28) and the jurisdiction of the Federal equity courts was intended to be based upon that of the English High Court of Chancery and to be uniform throughout the states, without impairment or restriction by state laws. The fact that in a given case relief cannot be afforded in a state chancery court does not preclude such relief being rendered in a Federal equity court where such case comes within the uniform and inherent jurisdiction of the Federal equity court. (Payne v. Hook, 7 Wall. 425, 429; In re Interstate Refineries, Inc., 18 Fed. (2) 360, 361; Matthews v. Rodgers, 284 U. S. 521, 529;—and other cases cited in Notes 1 and 4 of Appendix).

(e) We have not lost sight of the doctrines set forth in the cases in Note 7 of the opinion in the instant case, to the effect that the Federal courts are bound by state statutes of limitation in suits to collect assessment liability, and will ordinarily follow state laws of administration and descent, and that where a creditor, or a receiver representing creditors of a national bank, *has failed to take seasonable action upon an accrued debt or obligation* (as in McClain v. Rankin, 197 U. S. 154, 158; Security Trust Company v. Black River National Bank, 187 U. S. 211, 237), a recovery will not be permitted where it is barred by the state law. However, the authorities very clearly distinguish between cases of the foregoing type, including matters involving the ordinary administration of assets, *and plenary suits involving rights enforceable under the ancient and inherent jurisdiction and procedure of equity*, where the primary question is, not the application of a state statute of limitation or bar, but whether the plaintiff has been guilty of laches

in the enforcement and prosecution of his case, particularly where, as in the instant case, the matter involves the enforcement of a substantive right *created* by Federal statute (as distinguished from state statute), and intended to be enforced under Federal statutes in the Federal courts, and where, further, the receiver never had an opportunity to present the claim against the estate of the decedent, due to the fact that it did not accrue and become enforceable until after the assets had been administered and the estate had been closed. Equity will not permit a right to be without a remedy, and will interfere or intervene, notwithstanding the state statutes of bar or limitation, in order to give relief (see Notes 3, 4, 5-7 of Appendix).

IV. The receiver has the right under the Federal statute to enforce assessment liability against the *record owner* and is not obliged to proceed against the non-record "real" owner. The present decision in effect prevents enforcement against the record owner, *i. e.*, the estate of Henry Forrest and the assets of the same in the hands of the defendant as distributee. Defendant, both as administrator and as beneficiary, *permitted the estate to remain liable of record* instead of causing the stock to be transferred. Under such circumstances it would certainly seem no more than equitable that the estate and the assets derived therefrom continue liable for the assessment. The depositors and creditors had the right to, and presumably did, rely upon the record stock ownership while the bank was a going concern, and it certainly does not seem equitable that they should now be required to resort (through the receiver) to the insolvent estate of the "real" owner and *permit the assets of the record owner to be retained free from the record ownership liability for the assessment.*

V. The undersigned, as counsel for the Receiver (and who is also attorney for the Comptroller of the Currency) has executed as part hereof the required certificate that the foregoing petition for rehearing is presented in good faith

and not for delay. The undersigned desires at this point to state further that careful consideration has been given to the question of the advisability of filing this petition, having in mind the heavy duties and burdens already imposed upon the Court by the cases required or permitted in due course to be heard. It is therefore with reluctance that counsel ventures to add to this burden, and this petition is filed only because of an earnest conviction that the merits of the case, and the importance of the principles involved in connection with the administration of insolvent national banks in receivership, are such as to justify reconsideration and reargument.

Respectfully submitted,

GEORGE P. BARSE,
Attorney for the Receiver of the Nephi National Bank, Nephi, Utah.

CERTIFICATE OF COUNSEL.

I, GEORGE P. BARSE, Counsel for the above named Receiver of the Nephi National Bank, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

GEORGE P. BARSE,
Attorney for the Receiver of the Nephi National Bank, Nephi, Utah.

APPENDIX.

A.

Summary of Principles, Together with Citations and Statutes in Support of Application for Re-Hearing.

1. The jurisdiction of the Federal equity courts is based upon that of the English High Court of Chancery, is uniform in application throughout the States, is not subject to impairment or restriction by State laws, *and the fact that in a given case relief can not be afforded in a State chancery court will not preclude such relief being rendered in a Federal equity court where such case comes within the inherent jurisdiction of the Federal equity court:*

Payne v. Hook, 7 Wall. 425, 429;
In re Interstate Refineries Inc., 18 Fed. (2) 360, 361;
McConihay v. Wright, 121 U. S. 201;
Johnston v. Roe, 1 Fed. Rep. 692, 695, 696;
McClellan et al v. Carland, 187 Fed. 915, 918, 919;
Spencer v. Watkins, 169 Fed. 379, 381-383;
Boyle v. Zacharie et al, 6 Pet. 648, 658;
Mississippi Mills v. Cohn, 150 U. S. 202, 204, 205;
Matthews v. Rodgers, 284 U. S. 521, 529.

2. The ancient doctrines of equity, now constituting part of Federal equity jurisdiction and available under Federal equity procedure, clearly recognized that the assets of a decedent are charged with the payment of his debts and obligations, and that a creditor who did not have opportunity to present his claim in due course of administration of the estate and who was not guilty of laches may pursue the assets into the hands of heirs and distributees. State statutes of limitation and/or of administration, are not necessarily a bar to enforcing such rights but will be considered on the question of laches:

Chewett v. Moran, 17 Fed. 820-824;
Board of Public Works v. Columbia College, 17 Wall. 521, 530, 531;

Williams v. Gibbes, 17 How. 239, 254, 255;
Johnson v. Culbertson, 79 Fed. 5, 6;
Johnston v. Roe, 1 Fed. Rep. 692, 695, 696;
Continental National Bank v. Heilman, 81 Fed. 36, 44;
McClellan et al v. Carland, 187 Fed. 915, 918, 919;
Harrison v Moncravie, 264 Fed. 776-779;
Humphreys v. Walsh, 248 Fed. 414, 417, 418;
Borer v. Chapman, 119 U. S. 587, 599, 600.

3. The Federal equity courts will recognize and follow the State law in matters of administration of estates as such, *but recognize a distinction* between matters involving the ordinary administration of estates, and *plenary suits* to establish an interest in or a trust upon assets either involved in or derived from a decedent's estate; and where a right or claim within the cognizance of equity is involved, under its inherent jurisdiction, the Federal equity courts will proceed with reference thereto, notwithstanding State laws, to the extent necessary to enforce or protect the right:

Harrison v. Moncravie, 264 Fed. 776-779;
McClellan v. Carland, 187 Fed. 915, 918, 919;
Spencer v. Watkins, 169 Fed. 379, 381-383.

4. The Federal equity courts are not *bound* to follow State decisions in cases founded upon *general principles of equity* and will permit no legal right to be without a remedy, notwithstanding the limitations of State law, the theory being that inasmuch as Federal equity jurisdiction *was not derived* from and is not dependent upon the States, *it can not be affected by* the State laws in cases within its inherent jurisdiction:

In re Interstate Refineries Inc., 18 Fed. (2) 360, 361;
McClellan et al. v. Carland, 187 Fed. 915, 918, 919;
Payne v. Hook, 7 Wall. 425, 429;
Johnston v. Roe, 1 Fed. Rep. 692, 695, 696;
Continental National Bank v. Heilman, 81 Fed. 36, 44;
Gest v. Packwood, 39 Fed. 525, 535.

In connection with the question of laches the Federal equity courts consider whether or not the claimant had notice *or had an opportunity to prosecute his claim* and furthermore, where the State statutes of limitation or bar would result in injustice, or in a right existing without a remedy, equity will interfere or intervene, notwithstanding the statute, so as to give relief:

McWilliams v. Excelsior Coal Co., 298 Fed. 884, 887;
Galliher v. Cadwell, 145 U. S. 368, 372;
Schindler v. Spackman, 16 Fed. (2) 45, 48;
Chewett v. Moran, 17 Fed. 820-824;
Borer v. Chapman, 119 U. S. 587, 602 ("It can not be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced" —P. 602);
Continental Natl. Bank v. Heilman, 81 Fed. 36, 44;
Gest v. Packwood, 39 Fed. 525, 535.

5. Federal equity courts recognize that the assets of the estate of a decedent are charged with a trust for the benefit of creditors, heirs, legatees and distributees, and will protect and enforce such trusts and charges:

McClellan et al. v. Carland, 187 Fed. 915, 918, 919;
Harrison v. Moncravie, 264 Fed. 776-779;
Borer v. Chapman, 119 U. S. 587, 602;
Drain v. Stough, 61 Fed. (2) 668, 669;
Payson v. Hadduck, 19 Fed. Case No. 10862, Page 23. (This case deals with assessment liability, the liability of heirs to the extent of assets received, the fact that the assessment liability was contingent and hence not within a non-claims statute, and that under the circumstances the case was peculiarly within the domain of equity.)

6. Federal courts are not bound by State decisions on the question of the validity and existence of rights under a Federal statute:

Johnson v. City of St. Louis, 172 Fed. 31, 35;
Seabury v. Green, No. 434, October Term 1934.

7. Federal Statutes

U. S. Code, Title 28, Chapter 18, Section 724.

CONFORMITY TO PRACTICE IN STATE COURTS. —The practice, pleadings, and forms and modes of proceeding in civil causes, *other than equity and admiralty causes*, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding. (Italics inserted)

U. S. Code, Title 28, Chapter 18, Section 725.

LAWS OF STATES AS RULES OF DECISION. The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in *trials at common law*, in the courts of the United States, in cases where they apply. (Italics inserted)

U. S. Code, Title 28, Chapter 2, Section 41 (16).

ORIGINAL JURISDICTION. The districts courts shall have original jurisdiction as follows:

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(16) *Suits against national-banking associations.* Sixteenth. Of all cases commenced by the United States, or by direction of any officer thereof, against any national banking association, *and cases for winding up the affairs of any such bank;* * * * (Italics inserted)

U. S. Code, Title 12, Chapter 2, Section 64.

INDIVIDUAL LIABILITY OF SHAREHOLDERS; TRANSFER OF SHARES. The stockholders of every national banking association shall be held individually re-

sponsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, sec. 23, 38 Stat. 273.)

U. S. Code, Title 12, Chapter 2, Section 66.

PERSONAL LIABILITY OF REPRESENTATIVES OF STOCKHOLDERS. Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name. (R. S. sec. 5152.)

SUPREME COURT OF THE UNITED STATES.

No. 214.—October Term, 1934.

Edwin R. Forrest, Petitioner,
vs.
Arch R. Jack, as Receiver of The Nephi National Bank of Nephi, Utah.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 4, 1935.]

Mr. Justice Butler delivered the opinion of the Court.

The respondent, receiver of an insolvent national bank, brought this action in the federal court for the district of Utah against the petitioner to recover an assessment made by the Comptroller of the Currency. That court held him not entitled to recover. The Circuit Court of Appeals reversed. 71 F. (2d) 264.

August 17, 1917, Henry Forrest died testate owning six shares of the Nephi (Utah) national bank stock registered in his name. By his will he gave $1,000 to his niece and the rest of his property to his widow for life and whatever thereof she might have at death in equal shares to their son, who is the petitioner here, and their daughter. The will was probated in the district court of Juab county, Utah, and petitioner was appointed administrator with the will annexed. Before decree of distribution he and the daughter transferred all their rights to their mother.

March 11, 1920, the court made an order reciting that the estate had been closed, and approved and settled the administrator's final account, and on the next day entered its decree directing that the property belonging to the estate be distributed to the widow. The administrator made distribution as ordered. The property so transferred included the bank stock, other personal property and real property. Shortly after the distribution, the widow deeded to her daughter some of the real estate and to the petitioner the balance which is still held by him and worth more than $2,000. Respondent says, and we assume, that these conveyances were made without consideration. As petitioner knew, the stock was

not transferred on the books of the bank but continued to stand in the name of his father.

After distribution the bank paid a dividend to its stockholders and sent petitioner a check payable to the estate covering the amount applicable to the six shares. He deposited the check in his mother's account in the bank, informed its officers that the stock belonged to her and suggested that thereafter checks for dividends be made to her. July 4, 1931, she died having no property other than the bank stock. November 17, 1931, petitioner applied to the court to be discharged as his father's administrator. November 18, having found the certificates covering the six shares among his mother's effects, he delivered them to the bank to be held for her estate. December 1, the court granted his application for discharge. The bank closed the same day. The Comptroller appointed respondent receiver and March 8, 1932, made an assessment of $100 on each share of the stock. Petitioner refused to pay the assessment on the shares formerly owned by his father.

The complaint asserts devastavit in that the petitioner as administrator failed to pay into court or to retain property sufficient to cover the assessment or to transfer the stock to a solvent person and disposed of the entire estate except the stock. It also alleges that the real property deeded petitioner by his mother, having been conveyed to him without consideration, is subject to a lien for the amount of the assessment. The case was tried without a jury. At the close of the evidence, respondent moved for judgment against petitioner personally and, if that be denied, for transfer of the case to the equity side and a decree against the real property. Petitioner moved for judgment. The court denied respondent's motion and granted that of petitioner. The Circuit Court of Appeals held petitioner had not committed devastavit, but that, as the stock stood on the books of the bank in the name of the deceased, his estate remained liable and that petitioner held the real property subject to the assessment. It remanded the case to the district court, directed its transfer to equity and that decree be entered in conformity with its opinion.

Title 12, U. S. Code, § 64, provides that "The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value

thereof, in addition to the amount invested in such stock. . . ." And see § 63. Section 66 provides that "Persons holding stock as executors, administrators, guardians, or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

The liability of stockholders is based upon the statute, § 64.[1] As a general rule, the person in whose name the stock stands on the books of the bank is liable,[2] but the actual owner may be held although the stock has not been registered in his name.[3] The liability does not altogether cease on the death of the owner but, as limited and defined by § 66, attaches to his estate.[4] The fiduciaries are exempt but the property belonging to the estate is liable as would be the deceased if living. No cause of action arises until the assessment is made by the Comptroller and, so far as concerns the need and amount, his findings are conclusive.[5] He acts under federal authority and in respect of determinations, orders and assessments may not be trammeled, controlled or prevented by state laws.[6] In the absence of federal enactments relating to procedure for enforcement of the liability imposed by § 66, collection

[1]McClaine *v.* Rankin, 197 U. S. 154, 161. Christopher *v.* Norvell, 201 U. S. 216, 225. United States *v.* Knox, 102 U. S. 422, 424. Keyser *v.* Hitz, 133 U. S. 138, 151. McDonald *v.* Thompson, 184 U. S. 71, 73-74. Studebaker *v.* Perry, 184 U. S. 258, 261.

[2]Whitney *v.* Butler, 118 U. S. 655, 660. Richmond *v.* Irons, 121 U. S. 27, 58. Matteson *v.* Dent, 176 U. S. 521, 530.

[3]Early *v.* Richardson, 280 U. S. 496, 499. Ohio Valley National Bank *v.* Hulitt, 204 U. S. 162, 168. Rankin *v.* Fidelity Trust Co., 189 U. S. 242, 252. Pauly *v.* State Loan and Trust Co., 165 U. S. 606, 619. Anderson *v.* Philadelphia Warehouse Co., 111 U. S. 479, 483. Bowden *v.* Johnson, 107 U. S. 251, 261. National Bank *v.* Case, 99 U. S. 628, 631.

[4]Matteson *v.* Dent, 176 U. S. 521, 524. Zimmerman *v.* Carpenter, 84 Fed. 747, 751. Drain *v.* Stough, 61 F. (2d) 668, 669.

[5]Kennedy *v.* Gibson, 8 Wall. 498, 505. Casey *v.* Galli, 94 U. S. 673, 677. National Bank *v.* Case, 99 U. S. 628, 634-635. United States *v.* Knox, 102 U. S. 422, 425. Bushnell *v.* Leland, 164 U. S. 684. McDonald *v.* Thompson, 184 U. S. 71, 72, 76. McClaine *v.* Rankin, 197 U. S. 154, 159, 160. Rankin *v.* Barton, 199 U. S. 228, 232.

[6]Rankin *v.* Barton, 199 U. S. 228, 232. Christopher *v.* Norvell, 201 U. S. 216, 225. Cf. Davis *v.* Elmira Savings Bank, 161 U. S. 275, 284.

is to be made in accordance with state laws governing claims against estates of deceased persons at least to the extent that such laws are not inconsistent with enforcement of the liability imposed by national authority.[7] There is no suggestion that the laws of the State of Utah discriminate against or are inadequate for the just and convenient enforcement of liability imposed, § 66, against estates of deceased stockholders. There can be no liability on account of assessments made after complete administration, final distribution of all the property and the extinguishment of the estate.

In this case, the Comptroller's assessment was made more than eleven years after complete distribution and long after decedent's widow as distributee became the actual, though not the registered, owner of the stock and liable under § 64. The decree of March 11, 1920, closed the estate. The fact that the administrator was not formally discharged until December 1, 1931, about the time the bank failed, is without significance here as the Comptroller's assessment was not made until March 8, 1932. As the estate had ceased to exist before the bank became insolvent, the Circuit Court of Appeals rightly held that petitioner as administrator was not required by Utah law (R. S., 1933, § 102-9-26) to retain or pay into court any property or money to cover possible future liability in respect of the stock that had been decreed and distributed to the widow. There is nothing to support the allegation of devastavit.

Section 102-9-28 provides: "When the accounts of the administrator or executor have been settled and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim. . . ." Viewed in the light of that provision, it is plain that the distribution fully extinguished the estate. It follows that petitioner's real estate that had belonged to decedent never became liable for the assessment.

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[7] McClaine *v.* Rankin, 197 U. S. 154, 158. McDonald *v.* Thompson, 184 U. S. 71. Matteson *v.* Dent, 176 U. S. 521, 528. Davis *v.* Weed, 7 Fed. Cas. 186, 187. Cf. Yonley *v.* Lavender, 21 Wall. 276. Security Trust Co. *v.* Black River National Bank, 187 U. S. 211, 227, *et seq.* Williams *v.* Cobb, 242 U. S. 307.

In *Matteson* v. *Dent*, 176 U. S. 521, relied on by the court below and by respondent, this court affirming the supreme court of Minnesota (70 Minn. 519; 73 Minn. 170) held the estate not to have been extinguished when the bank became insolvent or when the assessment was made. The facts of that case were similar to those now before us. The estate of a deceased stockholder of a national bank was, after administration, fully distributed without a transfer of the stock on the books of the bank. Later, because of its insolvency, the Comptroller closed the bank and made an assessment against its stockholders. He brought suit and obtained judgment against distributees under and in accordance with the General Statutes of Minnesota, 1894, § 5918, which declares: "The next of kin of a deceased person are liable to an action by a creditor of the estate, to recover the distributive shares received out of such estate, or so much thereof as may be necessary to satisfy his debt . . ." That this statute utterly differs from that of Utah (§ 102-9-28) clearly appears from the opinions of the Minnesota supreme court. In the first one it said (p. 522): "The claim here in question was a contingent claim, which did not become absolute until after the time to file claims had expired, and the estate was distributed to the widow, heirs and next of kin. Under these circumstances, the plaintiff may maintain an action under G. S., 1894, c. 77, [which includes § 5918] against the distributees to recover of them the amount of the liability not exceeding the amount of the distributive share received by each." On the second appeal, the court overruled the contention that the liability of each distributee was limited to the amount of the bank stock he received from the estate. And this court, following and interpreting these decisions and affirming the judgment, held that, although the property had been allotted and delivered to the persons thereunto entitled under the decree of the probate court, the estate had not been extinguished but continued to exist subject to the liability defined in § 66. As by Minnesota law—contrary to that of Utah—decedent's estate after distribution continued to be subject to the enforcement of claims, that case does not support respondent's contention here.

The judgment of the Circuit Court Court of Appeals is reversed and that of the District Court is affirmed.